Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year ending June 30, 1947

Publication of this Document Approved by the State Purchasing Agent.

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900. 7-'47. 21567.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 14, 1948.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending June 30, 1947.

Very respectfully,

CLARENCE A. BARNES,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

State House

Attorney General

CLARENCE A. BARNES

First Assistant Attorney General

GEORGE B. ROWELL

Assistants

ROGER CLAPP
NATHAN B. BIDWELL
WILLIAM S. KINNEY
CHARLES SHULMAN
GEORGE P. DRURY[1]
GEORGE F. FINGOLD
MICHAEL A. FREDO
DAVID J. CODDAIRE
WM. GARDNER PERRIN
ALFRED E. LOPRESTI
HERBERT D. ROBINSON
NORRIS M. SUPRENANT
SUMNER W. ELTON
WILLIAM H. SULLIVAN
ERNEST BRENNER
THOMAS F. MCLAUGHLIN
CONDE J. BRODBINE
BEATRICE H. MULLANEY
RICHARD J. COTTER, JR.

Assistant Attorneys General assigned to Veterans' Division

NICHOLAS DELEO — JOEL L. MILLER

Assistant Attorneys General assigned to Division of Employment Security

SAUL GURVITZ — JOSEPH S. MITCHELL

Chief Clerk to the Attorney General

HAROLD J. WELCH

List Clerk to the Attorney General

JAMES J. KELLEHER

Director of Division of Collections

W. FORBES ROBERTSON

[1] Specially assigned to N. Y., N. H. & H. R.R. and Boston Elevated Railway cases.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1946, to June 30, 1947

Appropriations.

Attorney General's Salary	$9,150 56
Assistants and others, salaries	169,572 58
Expenses	16,812 95
Settlement of damages by state-owned cars (G. L. (Ter. Ed.) c. 12, § 3B)	8,000 00
Settlement of small claims (G. L. (Ter. Ed.) c. 12, § 3A)	4,000 00
Settlement of certain claims (Stat. 1946, Resolve 92)	5,000 00
Veterans' legal assistance	20,329 68
New York, New Haven and Hartford Railroad	553 46
Total	$233,419 23

Expenditures.

For salary of the Attorney General	$9,150 54
For salaries of assistants and others	169,572 58
For office expenses	16,788 75
For settlement of damages by state-owned cars (G. L. (Ter. Ed.) c. 12, § 3B)	7,999 44
For settlement of small claims (G. L. (Ter. Ed.) c. 12, § 3A)	3,998 56
For settlement of certain claims (Stat. 1946, Resolve 92)	5,000 00
For veterans' legal assistance	20,291 78
For New York, New Haven and Hartford Railroad	303 79
Total	$233,105 44

The principal financial items of this report are in agreement with the Comptroller's books.

Checked by JOSEPH A. PRENNEY.

FRED A. MONCEWICZ,
Comptroller.

JANUARY 12, 1948.

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 14, 1948.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws (Tercentenary Edition), as amended, I herewith submit my report.

The cases requiring the attention of this Department during the fiscal year ending June 30, 1947, totaling 11,854, are tabulated as follows:

Corporate franchise tax cases	2
Extradition and interstate rendition	118
Land Court petitions	123
Land damage cases arising from the taking of land:	
Department of Public Works	58
Metropolitan District Commission	2
Metropolitan District Water Supply Commission	10
Miscellaneous cases, including suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth	2,591
Petitions for instructions under inheritance tax laws	1
Estates involving applications of funds given to public charities	247
Settlement cases for support of persons in state hospitals	78
Pardons:	
Investigations and recommendations in accordance with G. L. (Ter. Ed.) c. 127, § 152, as amended	151
Workmen's compensation cases, first reports	2,057
Cases in behalf of Division of Employment Security	1,005
Cases in behalf of Veterans' Division	5,411

It has been my privilege to serve the people of the Commonwealth of Massachusetts as their Attorney General since January 17, 1945. During that period of time many new and important questions of law have arisen in the Commonwealth, some of which have been dealt with in my prior reports.

Since my last report I have followed the custom developed in my prior years in office of conferring with the District Attorneys and their assistants. Many important problems have been considered by these law enforcement officers of the Commonwealth at these conferences. As a result, certain suggestions have been made to the Legislature in the form of specific bills, most of which have been acted upon favorably by the General Court except those which are pending before the present Legislature. As a result of the meetings held during the year 1946, commissions were set up to investigate matters involving sex crimes and juvenile delinquency.

Both of these commissions have reported to the Legislature, either in final or preliminary form. The matter of their reports has been discussed further with the District Attorneys and certain additional recommendations have been or are to be made. It has seemed to me that the solution of these two problems will add greatly to the well-being of the Commonwealth, and no effort in these matters has been spared so far as the District Attorneys, their staffs, my assistants and myself are concerned.

During the past year I have caused an audit of the depreciation allowances of the Boston Elevated Railway Company to be made by Price, Waterhouse & Company, and an engineering audit to be made by Coverdale & Colpitts. I have previously submitted to every member of the Legislature a full and complete report concerning their findings in so far as they had reference to the declaratory judgment proceedings which were pending between the Commonwealth and the Boston Elevated with respect to these matters. In addition to this, I have conferred with the legislative Committees on Transportation and Metropolitan Affairs with respect to the legislation, which has now become law, through which the public eventually acquired complete ownership of the stock of the Boston Elevated Railway Company. In accordance with the instructions of the Legislature in the act establishing the Metropolitan Transit Authority, all actions between the Commonwealth and the Boston Elevated Railway Company have been discontinued. There is presently pending an action brought by the Boston Elevated Railway Company against the Metropolitan Transit Authority involving the question as to who should pay the capital gains tax, if any, on the transfer of the property of the Elevated. This action, I believe, may be heard in the early part of the coming year.

There is pending certain litigation between the Lowell Gas Light Company and the Department of Public Utilities concerning the rates of the Lowell Gas Light Company. This important piece of litigation has been heard before a master appointed by the Supreme Judicial Court, and probably the questions involved will be decided during the coming year.

The 1946 Legislature passed an act to dissolve the Boston Holding Company. The constitutionality of this act has been challenged and the facts have been heard by a single justice of the Supreme Judicial Court. After the facts have been found in this case it will be reported to the Supreme Judicial Court, and the question of the constitutionality of this act will be finally determined at that time.

In accordance with the pledge which I made to the people when I first assumed the office of Attorney General, I established a Veterans' Division, where the veteran, his widow, orphan or other dependent could receive free legal advice to the end that all of their rights might be protected. Two Assistant Attorneys General have devoted their entire time to this division.

Over five thousand veterans and their parents, wives, widows and dependents, have been given legal advice by the Veterans' Division during the period of July 1, 1946, to June 30, 1947.

This division followed veterans' legislation very closely during the 1947 legislative session. In order to keep the veteran posted, monthly bulletins were issued setting forth laws which had been enacted. Current veterans'

news items of national importance were also printed in the bulletin. These bulletins were sent to veterans' services and veterans' organizations throughout Massachusetts, and also to radio, press and any other mediums which could reach the veteran. The newspapers and radio, through feature stories, veterans' columns and their programs, have been most cooperative in calling this legal service to the attention of veterans.

The problems confronting veterans change as time goes on and what might have been a serious situation to them two years ago is no longer an urgent problem. During the past year most of these involved bonus, real estate transactions, tax exemption on real estate, used car deals, evictions, licenses, reinstatement, civil service, claims, education and employment.

Questions relating to bonus and discharges have decreased, and those concerning contracts, real estate and taxation have increased during the last six months of the fiscal year. At the present time cases show a tendency toward difficulties which confront the veteran in his status as a civilian.

Most of the cases of this division are handled by personal interviews in the office by Assistant Attorneys General Joel L. Miller and Nicholas DeLeo, but many telephone calls and letters are received each day from veterans or members of their families, veterans' services, veterans' organizations or State, city and town departments seeking information or advice on matters affecting veterans. Inquiries are not only State-wide but also are from veterans in other States who consider Massachusetts their home.

Many fraudulent practices have been brought to the attention of the division by veterans and every effort has been made to check such reports carefully. This division has constantly watched advertisements which would tend to mislead the veterans.

The division has brought about the closing of one pharmacy school and has kept a watchful eye on institutions which fail to measure up to the standards to which the G. I. is entitled.

A real estate agent with an "apartment finding service" was stopped from continuing this service because he was taking fees from veterans without making any effort to find apartments and with the full knowledge that no apartments were available.

An "On the Job Training" program was made a success by this division, co-operating with one of the State departments, thereby enabling hundreds of veterans to profit by such training.

Veterans have been helped in their dealings with used car dealers who have attempted to defraud them, and many such dealers have been prevented from continuing to sell defective autos to veterans and from other practices of a similar nature.

A great many veterans are now seeking legal counsel of this division before they sign contracts or agreements of any nature to find out just what their legal rights would be. This is very gratifying, because it has been the hope and purpose of this division to become so well known among the veterans that they will call upon it for legal advice before they are confronted with legal entanglements.

I feel that there has been established a legal service of real value to the veteran and his family, and I earnestly hope that if they are in need of legal advice they will continue to communicate with this division. I recommend the continuance of this Veterans' Division.

As Attorney General I have continuously given advice to elected officers, department heads and members of the Legislature, either through formal opinions or more frequently through informal advice. I have sought at all times, by the help of my able assistants, to conduct this department with efficiency and high standards in fairness to all people.

The development of the airport at Boston and the Port of Boston has brought many involved legal problems. On many occasions, either in person or through one of my assistants, appearances have been made on behalf of the citizens of Massachusetts before the Civil Aeronautics Board at Washington, seeking to secure additional rights for Boston Logan International Airport. Many of the problems of the development of the Port of Boston have required substantial attention from myself or my assistants.

I have not attempted in this report to set forth in detail many of the activities of the department. It is sufficient to say that I have personally, and with the help of my assistants, acted as the people's attorney throughout my administration. I am convinced that the Assistant Attorneys General and the other members of the department have carried out their duties with dignity, ability and loyalty, not only to myself, but to the Commonwealth of Massachusetts.

Respectfully submitted,

CLARENCE A. BARNES,
Attorney General.

OPINIONS.

Department of Public Works — Registrar of Motor Vehicles — Authority of Each — Appeals.

JULY 15, 1946.

Hon. JOSEPH F. CAIRNES, *Commissioner of Public Works.*

DEAR SIR: — You have asked my opinion on four questions with regard to the relation of the Department of Public Works to the Registry of Motor Vehicles, in view of the provisions of St. 1946, c. 234.

1. Your first question is:

"Should the Commissioners continue to give hearings to persons aggrieved by decisions of the Registrar?

If the answer is in the affirmative, by what authority may the Commissioners direct the Registrar to restore an automobile driver's license or registration when they annul his decision?"

I answer this question in the affirmative.

St. 1946, c. 234, amended G. L. (Ter. Ed.) c. 16, as previously amended, by striking out section 5 and inserting in its place the following new section 5 which reads:

"There shall be in the department, but in no manner subject to its control, a division of motor vehicles, to be known as the registry of motor vehicles. With the approval of the council, the governor shall appoint for a term of five years, and may remove for cause, an officer to be known as the registrar of motor vehicles who shall be the executive and administrative head of the division. In addition to the deputy registrar, assistant to the registrar, hearings officers, supervising inspectors, investigators and examiners authorized to be appointed by the registrar under section twenty-nine of chapter ninety, he may appoint such other officers and employees as may be necessary to carry out the work of the division. In the event of a vacancy in the office of registrar, his powers and duties shall be exercised and performed by the deputy registrar until a registrar is duly qualified. A license to operate motor vehicles issued by a registrar shall become valid upon the effective date thereof, notwithstanding the fact that the registrar who issued the same ceased to hold said office prior to said effective date."

The word "control," as used in the first sentence of the above section 5, does not include within its meaning the quasi-judicial power vested in the Department of Public Works by G. L. (Ter. Ed.) c. 90, § 28, to review decisions of the Registrar upon appeals and to make orders affirming, modifying or annulling such decisions, and the Registrar is required to effectuate such orders. The provisions of said section 28 relative to appeals to the department have not been specifically repealed by the terms of the new section 5 and it cannot well be said that there is a repeal by implication. The phrase "in no manner subject to its control," as used in the new section 5, appears from the context of said section to relate to

such administrative and executive control as is commonly exercised by departments over their divisions and not to such authority as is exercised by this department acting in a quasi-judicial capacity upon appeals of motor vehicle owners from rulings or decisions of the Registrar.

2. Your second question is:

"Should the Registrar file a separate annual report or should the report of the Registry be continued as part of the annual report of the Department?

"If the report of the Registrar is to be a part of the Department's report, do the Commissioners, as signatories, have authority to edit the report of the Registry?"

Inasmuch as the provisions of said new section 5 make the Registrar of Motor Vehicles "the executive and administrative head" of the division, and the division is not in such respects under the "control" of the Department of Public Works, he should file a separate annual report which it is not within the authority of the Commissioners of Public Works to edit. Whether or not the Registrar's report, over his signature, is as a matter of form to be set forth in the report of the Department of Public Works, which latter report is signed by the Commissioners, would appear to be a matter of practice to be determined by mutual agreement rather than one of law.

3. Your third question is:

"Should a separate budget be prepared by the Registry?

"If so, do the Commissioners have authority to revise the budget prepared by the Registrar?"

In view of the considerations to which I have already referred, I am of the opinion that the Registrar should prepare a separate budget, which the Commissioners of the Department of Public Works have no authority to revise.

4. Your fourth question is:

"Does the Commissioner of Public Works still retain the authority granted under G. L. c. 26, § 8A, to designate a representative to act in place of the Registrar of Motor Vehicles on the Board of Appeal?"

I answer this question in the affirmative.

Said new section 5 does not specifically repeal the provision of G. L. (Ter. Ed.) c. 26, § 8A, as amended, under which the Commissioner of Public Works may appoint a representative of the Registrar of Motor Vehicles to act in place of the Registrar as a member of the Board of Appeal on Motor Vehicle Liability Policies and Bonds, which board serves in the Division of Insurance of the Department of Banking and Insurance. Such provision is not repealed by implication from the terms of said new section 5, for the authority to appoint a representative of the Registrar as a member of the said Board of Appeal, which board is not in the Division of Motor Vehicles, is not the exercise of "control" over the Division of Motor Vehicles such as is prohibited by the first sentence of said new section 5.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Massachusetts Aeronautics Commission — Quorum — Authority to Act.

JULY 22, 1946.

Massachusetts Aeronautics Commission.

GENTLEMEN: — I am in receipt from you, through the Director, of the following request for my opinion:

"At a meeting of the Aeronautics Commission held on Monday, July 15, I was directed to request an opinion from you as to the application of the provisions of G. L. c. 4, § 6, par. 5, on acts of the Commission.

"The specific question at issue is this: Does this, or any other provision of law, require that official acts of the Commission shall be based upon a majority vote of the full Commission or may its statutory authority be exercised by the vote of a majority of a quorum which would be less than a majority of the entire Commission of five members."

I answer your question to the effect that official acts of the commission are required to be based upon a majority vote of the full commission. Although a majority of the commission constitutes a quorum which may transact necessary business, a vote by a majority of such quorum, when it is less than a majority of the entire commission, does not constitute action by the commission as such.

G. L. (Ter. Ed.) c. 4, § 6, cl. 5, with reference to construing statutes, which you refer, reads:

"Fifth, Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons."

When the Legislature desired to provide that a statute should be so construed as to effectuate action by a majority of a quorum of certain public officers less than a majority of the whole body, it has specifically so stated, as in clause 7 of said section 6. The rule for construing statutes set forth in said clause 5 makes no such provision for construing statutes relative to boards or commissions of public officers generally.

The rules for construing statutes set forth in the various clauses of said section 6 are, by the terms of such section, to be "observed, unless their observance would involve a construction" of a statute "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute."

The rule laid down in said clause 5 is not inconsistent with what appears to have been the manifest intent of the Legislature in enacting G. L. (Ter. Ed.) c. 6, §§ 57, 58 and 59, inserted by St. 1946, c. 583, § 1, creating the Massachusetts Aeronautics Commission, and in enacting sections 2 to 5 of said chapter 583. Indeed, the rule appears to be in harmony with such intent and not to be repugnant to the context of such statutes, for in general the duties laid upon the commission in such measures are of such a character as may well be deemed to require the considered agreement of a majority of the whole commission, while the carrying out of the orders of the commission and the performance of the bulk of the detail of its work are to be done by a director who is its executive officer.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Department of Public Works — Bridges — Public Hearings — State Highways.

JULY 22, 1946.

Hon. JOSEPH F. CAIRNES, *Commissioner of Public Works.*

DEAR SIR: — In a recent letter you have written:

"Chapter 690 of the Acts of 1945 provides, subject to certain conditions, for the transfer on January 1, 1946, to the Department of Public Works of the care, control and maintenance of certain highway bridges, after which date each bridge 'shall be a state highway.'

. . . . . .

"In view of the fact that the bridges referred to are made state highways under chapter 690, will you please advise as to whether this legislation eliminates the necessity for holding public hearings as required under section 5 of chapter 81?"

I answer your question to the effect that since the inclusion in the State highway of the existing bridges referred to in St. 1945, c. 690, is mandatory and occurs not by reason of any determination of the Department of Public Works but by virtue of the legislative command, the provisions of G. L. (Ter. Ed.) c. 81, § 5, as amended, requiring a hearing before your department determines that a way should be laid out or taken charge of by the Commonwealth, are not applicable to those bridges which are the subject matter of said chapter 690.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Structures in Tidewaters — Grants — Licenses — Compensation.

JULY 22, 1946.

Hon. JOSEPH F. CAIRNES, *Commissioner of Public Works.*

DEAR SIR: — You have advised me that one Norton filed a petition for a license to build a wharf and elevator railway in the tidewaters of Edgartown Harbor under the provisions of G. L. (Ter. Ed.) c. 91, § 14, that a license was granted, and that under the terms of G. L. (Ter. Ed.) c. 91, § 22, compensation to be paid for the right granted was determined by the Governor and Council to be the sum of four hundred dollars.

You have also advised me that the structures in question are of the same character and no greater in extent than those authorized to be erected and maintained at the same place by one John O. Morse by virtue of St. 1835, c. 59, the remains of structures previously erected having been destroyed in 1944.

With relation to the foregoing facts which you have set forth you have asked my opinion as follows:

"Your opinion is requested as to whether or not the statute of 1835 constituted a grant of the interests of the Commonwealth in this location, which the engineers of this department agree is the same location in part

as is covered by the license, to such an extent that no charge should be made by the Governor and Council, acting under the provisions of G. L. c. 91, § 22."

If the said Norton is the owner of the land formerly owned by said Morse above low water mark adjoining the place which would be occupied by said structure, I am of the opinion that no charge for the license may be made. If he is not such owner, the charge may properly be imposed.

Said St. 1835, c. 59, reads:

"*Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same*, That John O. Morse be, and he hereby is authorized and allowed to build, erect, continue and maintain a marine railway and wharf, in the harbor of Edgartown, in Dukes County, below low water mark, adjoining his land, and to extend the same into the channel of said harbor, to where there may be a depth of water equal to that at the other wharves erected in said harbor, and that he be allowed all the privileges heretofore granted to proprietors of wharves, or that may hereafter be granted to proprietors of wharves, or marine railways in said harbor, for the use, occupation, and accommodation of said wharf and railway: provided, that this grant shall in nowise interfere with the legal rights of any other person or persons whatever."

Legislative enactments similar to said chapter 59, conferring authority to erect and maintain structures over tidewater prior to the passage of St. 1869, c. 432, constituted irrevocable grants rather than licenses in the absence of provisions in them showing a contrary intent.

Fitchburg R.R. Co. v. *B. & M. R.R.*, 3 Cush. 58, 87.
Bradford v. *McQuestion*, 182 Mass. 80, 81, 82.
Treasurer & Receiver General v. *Revere Sugar Refinery*, 247 Mass. 483.
Commissioner of Public Works v. *Cities Service Oil Co.*, 308 Mass. 349, 353.

St. 1869, c. 432, provided that such authority when granted thereafter should be revocable.

The said St. 1835, c. 59, contains nothing to indicate that the authority therein granted was to be revocable.

The grant by the terms of the chapter was attached to the "adjoining land" referred to therein and inures to the benefit of the owner.

Treasurer & Receiver General v. *Revere Sugar Refinery*, 247 Mass. 483, 489.
Fitchburg R.R. Co. v. *B. & M. R.R.*, 3 Cush. 58, 86, 87.

Application by the present owner for a license and its acceptance do not affect his rights under the grant.

Treasurer & Receiver General v. *Revere Sugar Refinery*, 247 Mass. 483, 491.

Nor would mere non-exercise of the rights granted destroy the express grant.

Atlanta Mills v. *Mason*, 120 Mass. 244, 251.

It follows from these considerations upon the facts of which you have advised me that Norton, if he is the present owner of the said adjoining

land, was entitled to erect the structures in question by virtue of the legislative grant of 1835 and that he did not require a license at the present time for that purpose. It would seem, then, that he should not be required to pay compensation under said chapter 91, section 22, since he had already, by act of the Legislature, been granted the authority to exercise the rights for which compensation is now called for. Doubtless all the circumstances of this matter had not been called to the attention of the Governor and Council before they made their determination.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veteran — Retirement under G. L. (Ter. Ed.) c. 32, §§ 56, 57 — Boston Police Officers.

JULY 24, 1946.

Mr. THOMAS F. SULLIVAN, *Police Commissioner of Boston.*

DEAR SIR: — You have asked my opinion upon two questions relative to the application of G. L. (Ter. Ed.) c. 32, § 57, as amended.

This is a matter upon which, under the long-established practice and procedure of this department, the Attorney General may with propriety advise you (see VII Op. Atty. Gen. 735; V Op. Atty. Gen. 394; IV Op. Atty. Gen. 451).

Your first question reads:

"Does the word 'veteran' as used in section 57, mean any veteran or is the meaning of this word confined to the definition of a veteran as set forth in section 56?"

I answer this question to the effect that the word "veteran" as used in G. L. (Ter. Ed.) c. 32, § 57, as amended, is limited by force of the specific description of a veteran set forth in section 56 of said chapter 32 and does not include a veteran of World War II. (See phraseology of St. 1920, c. 574, §§ 1, 2 and 4, the original source of said sections 56 and 57.) The Legislature has not seen fit to amend said sections 56 and 57 so as to include veterans of World War II within their provisions.

The provisions of the new retirement act, G. L. (Ter. Ed.) c. 32, as amended by St. 1945, c. 658, have employed a broader definition of the word "veteran" sufficient to include veterans of World War II (section 1), and in sections 6, 25 and 57A thereof provision has been specifically made with reference to the retirement of all veterans who are members of the system. Such provisions will be applicable to police officers of Boston when the new retirement act becomes effective therein.

Your second question reads:

"Is the age limit of 'fifty years' as set forth in section 56 to be considered in connection with the provisions of section 57, or is petition filed under the provisions of section 57 to be considered without regard for the age of the petitioner?"

With relation to the class of veterans described in said section 56, to which alone the provisions of said section 57 apply, no requirement that a veteran to be retired under section 57 shall have attained fifty years of age has been made by the Legislature. A provision relative to the attain-

ment of fifty years of service has been made with regard to those veterans who are to be retired under the provisions of section 56, but this has not been made applicable to those who may be retired under said section 57 upon petition.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — State Agency to Administer Federal Program — School Luncheons.

JULY 24, 1946.

His Excellency MAURICE J. TOBIN, *Governor of the Commonwealth.*

SIR: — You have requested my opinion in a recent communication upon two questions relative to State agencies co-operating with the United States Department of Agriculture under the provisions of the "National School Lunch Act."

Your questions are as follows:

"1. Do I, as Governor, have authority to designate an agency for the purposes outlined above? If so, must this agency be the Department of Education? Have I authority to designate the Department of Education and the Department of Public Welfare acting jointly through a State Director of School Food Programs as the State agency designated to carry out the provisions of this legislation?

"2. Would any of the agencies referred to in Question 1 have authority to enter into an agreement in behalf of the Commonwealth with the U. S. Department of Agriculture to administer this program for the benefit of private schools not operated for profit as well as public schools?"

1. I answer your first question to the effect that by virtue of the provisions of St. 1942 (Sp. Sess.) c. 13, §§ 2 (13) and 3, you have authority to designate an agency to administer the provisions of the said Act of Congress within the Commonwealth. I know of no reason why your choice of such an agency should be limited to the Department of Education and I am of the opinion that you may, if you deem best, designate the Departments of Education and Public Welfare to act jointly as such agency, and such joint agency may function through an official to be called a State Director of School Food Programs.

2. In relation to your second question, I am of the opinion that the agency appointed by you would have authority to enter into an agreement on behalf of the Commonwealth with the United States Department of Agriculture to effectuate the provisions of said National School Lunch Act (U. S. Pub. Law 396 — 79th Congress, approved June 4, 1946), except that it may not agree to pay money of the Commonwealth to non-profit private schools as matching Federal funds expended for such purpose or otherwise.

Such a payment by the State agency is prohibited by the provisions of the Constitution of Massachusetts. Amendments, Art. XLVI, sec. 2.

In so far as the State agency might agree under the program established with relation to school lunches to implement the Congressional Act by distributing moneys of the United States, *not* of the Commonwealth, to

private as well as public schools on behalf of the United States, such action would not be prohibited by the provisions of the Constitution of Massachusetts (see Attorney General's Report, 1942–1944, p. 74).

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Application of Veterans' "Bonus" under St. 1945, c. 731.

JULY 31, 1946.

Hon. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — In a recent letter relative to certain applications for the "bonus" under St. 1945, c. 731, by members of the regular armed forces of the United States who had enlisted and were serving therein at and for a considerable period before September 16, 1940, you have called attention to the cases of such members who had actually established residences in Massachusetts for more than six months prior to September 16, 1940, but who did not have such residences in the Commonwealth at the time of their original entry into such forces.

You have asked me whether the six months of residence required by the statute as one of the prerequisites to the receipt of a bonus is to be regarded, with reference to such members, as the six months immediately prior to September 16, 1940, or as the six months prior to their original entry into the service of the armed forces.

Said St. 1945, c. 731, § 1, reads:

"Upon application, as hereinafter provided, there shall be allowed and paid out of the treasury of the commonwealth, without appropriation and without a warrant from the governor and council, to each person who shall have served in the armed forces of the United States on or after September sixteenth, nineteen hundred and forty and prior to the termination of the present war, as declared by presidential proclamation or concurrent resolution of the congress, and shall have received a discharge or release, other than a dishonorable one, from such service, the sum of one hundred dollars; provided, that every person on account of whose service the application is filed shall have been a resident of the commonwealth for a period of not less than six months immediately prior to the time of his entry into service and his enlistment, induction or commission in said armed forces was credited to the quota of Massachusetts under the federal selective service act."

I am of the opinion that the period of six months' residence is to be calculated as from September 16, 1940, the words "entry into service" read in conjunction with the words "shall have served in the armed forces of the United States on or after September sixteenth, nineteen hundred and forty and prior to the termination of the present war," being intended by the Legislature to refer, in my opinion, to the beginning of service with the armed forces during World War II rather than to the original time of joining such forces.

Such an interpretation is in harmony with the general intent of the Legislature as shown by the context of the statute read in the light of its title and its emergency preamble.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Application of Veterans' "Bonus" under St. 1946, c. 581.

July 31, 1946.

Hon. John E. Hurley, *Treasurer and Receiver General.*

Dear Sir: — You have asked my opinion relative to the meaning of the term "continental limits of the United States," as it appears in St. 1946, c. 581, § 1, par. 2, with relation to applicants for the "bonus."

The Attorney General, following a long line of practice and procedure of this department, does not give general interpretations of statutes nor attempt to enunciate rules concerning the applicability of statutory terms to hypothetical situations.

All questions of fact with relation to applications for the "bonus" are peculiarly for your determination, and each application should be considered by you in the light of the particular facts and circumstances connected with the applicant's service in World War II.

For your guidance in passing on such applications, let me say that the portion of said section 1 where the term occurs reads:

"Payments under this act which are in addition to the said sum of one hundred dollars shall be to persons and in sums as follows: —

"(1) One hundred dollars to each person who performed active service for more than six months but served no part thereof in Alaska or in any place outside the continental limits of the United States;

"(2) Two hundred dollars to each person who performed active service outside the continental limits of the United States or in Alaska."

You have advised me that —

"The records of some applicants who served in the Navy indicate that they were 'shore-based' and their tour of duty took them beyond the three-mile limit but at no time did they enter into any theatre of war. The question in this type of case is whether it was the intent of the Legislature to make such applicants eligible for the additional two hundred dollar payment."

Irrespective of whether applicants entered into any theatre of war, if their duties required them to go beyond the three-mile limit from our coasts not as merely incidental to shore-based duty but in the course of active service for a considerable period or periods, they may fairly be said to have performed "active service outside the continental limits of the United States" within the meaning of the statute.

Service in the Canal Zone may fairly be treated as outside the continental limits of the United States under the instant statute. You have advised me that Canal Zone service is regarded, by virtue of an opinion of the United States Judge Advocate General, as entitling the one so serving to "foreign service pay" under the provisions of the United States statutes.

Very truly yours,

Clarence A. Barnes, *Attorney General.*

Labor Relations Commission — Rules and Regulations — Scope of Commission's Authority.

Aug. 6, 1946.

Massachusetts Labor Relations Commission.

Gentlemen: — In a recent communication you have called my attention to article II, section 3, of the rules and regulations of your commission, with particular reference to the last two sentences thereof, and you have asked my opinion upon the "status" of such rules.

In my opinion the rule or regulation embodied in the last two sentences of said section 3 is one which your commission had no authority to make under the provisions of G. L. (Ter. Ed.) c. 23, § 9R, and is void.

Said chapter 23, section 9R, reads:

"The commission shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of sections nine O to nine Q, inclusive, and chapter one hundred and fifty A. Such rules and regulations shall be effective upon publication in the manner in which the commission shall prescribe."

By said chapter 150A, section 5 (*c*), you are authorized to investigate questions affecting industry and trade which arise concerning the representation of employees for the purpose of collective bargaining.

Said section 5 (*c*) reads:

"(*c*) Whenever a question affecting industry and trade arises concerning the representation of employees, the commission may investigate such controversy and certify to the parties, in writing, the name or names of the representatives who have been designated or selected. In any such investigation, the commission shall provide for *an appropriate hearing upon due notice* either in conjunction with a proceeding under section six or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

The rule or regulation in question as appearing in Article II of your rules reads:

"Article II.

"Procedure under Section 5 of the Law Relative to Certification.

"*Section 1.* In initiating action under section 5, a petition requesting the Commission to investigate and certify the name or names of the representatives designated or selected for the purposes of collective bargaining shall be filed with the Commission. Said petition must be signed by the petitioner.

. . . . . .

"*Section 3.* If it appears to the Commission that an investigation should be instituted, it shall so direct and shall provide for an appropriate hearing upon due notice. The Commission or its agents shall proceed with such investigation and in connection therewith shall prepare and cause to be served upon the petitioner, upon the employer involved, and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, whether named in the petition or not, a notice of hearing upon the question of representation before the Commission, at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. *For*

the purpose of informing the employees affected by the certification proceedings, the posting of notice or orders of the Commission at the place of business of the employer where readily accessible to the employees, shall constitute due notice to such employees. Copies of the petition and the notice of hearing to be held thereon shall be so posted."

While it is true that in regard to a controversy or question concerning "the representatives of any employees" notice to the employees affected of the statutory hearing may be considered as part of the "due notice" called for by said section 5 (*c*), it does not follow that the requirement for notice *by posting at the place of business of the employer* is one which your commission is authorized to require.

Although it may be that the Legislature itself might under certain circumstances authorize an entry upon an individual's property for the performance of an act of brief duration, involving no considerable damage to the realty and incident to the performance of a required official duty, such as posting a notice, without violating constitutional provisions against appropriating property to public uses without compensation (see Mass. Const., Pt. I, Art. X; *Winslow* v. *Gifford*, 6 Cush. 327), the Legislature has not empowered your commission to make such an authorization nor will a person entering upon the property of an employer under the provisions of the said rule be exempt from an action for trespass.

Furthermore, although the manner of giving "due notice" of a hearing is not set forth in said section 5 (*c*), nevertheless the Legislature appears to have dealt fully with the mode in which notice of a hearing, which notice may be fairly said to be a part of "process and papers of the commission" referred to in section 7 (4) of said chapter 150A, shall be given. The subject appears to be covered by the provisions embodied in the first two sentences of section 7 (4). This section in its applicable parts reads:

"SECTION 7. For the purpose of all hearings and investigations which, in the opinion of the commission, are necessary and proper for the exercise of the powers vested in it by sections five, six . . .

. . . . . .

"(4) Complaints, orders and other process and papers of the commission, its member, agent or agency may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of service of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. . . ."

The subject having been thus fully covered by the Legislature and no authorization for the giving of notice by posting on the premises of an employer being included therein or otherwise vested in your commission, it follows that your commission has no power under the terms of said chapter 150A or chapter 23, section 9R, to make provision for notice by such posting.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — Military Leave of Absence — Promotional Examinations.

AUG. 12, 1946.

Hon. THOMAS J. GREEHAN, *Director of Civil Service.*

DEAR SIR: — In a recent letter you have asked my opinion as to whether under the provisions of St. 1945, c. 610, as amended by the inserting therein by St. 1946, c. 271, of new sections 3D and 3E, an applicant for promotion given a qualifying examination in 1946 "because" by reason of military service he "was unable to compete in a competitive promotional examination" in 1943, and passing the same, is to be placed on an eligible list established as the result of the said promotional examination in 1943, or whether he should be placed on an eligible list established in 1941 as the result of a promotional examination held on April 16, 1941, at which last-mentioned date he was not eligible to take the said examination of April 16, 1941.

The pertinent provisions of said sections 3D and 3E read as follows:

"*Section 3D.* Whenever any civil service employee is or was unable to compete in a competitive promotional examination because of his absence in said military or naval service, he shall, if he so request in writing not later than six months after September first, nineteen hundred and forty-six or the date of termination of his said military or naval service in case it is terminated after said September first, be given a qualifying promotional examination. . . .

"*Section 3E.* If there is an eligible list in existence, the name of any person passing an examination provided in section three D shall be placed thereon in the order of percentage, and if there is more than one eligible list he shall be placed on the first list established unless prior to placement thereon he notifies the director otherwise. . . ."

You have informed me that the practice of your department, based upon its construction of the applicable statutes prior to 1946, had been to place such an applicant upon the first list established as a result of the examination in the later year and not upon the list earlier established as a result of the examination held in the earlier year which an applicant was not eligible to take.

Said section 3E provides that an applicant such as you have described, passing such a promotional examination, shall be placed "if there is more than one eligible list . . . *on the first list established.* . . ."

The quoted words prior to the amendment of 1946 appeared in section 3D. By the said amendment they have been placed in section 3E, but the Legislature has not made plain what it intended to mean by the words "first list established."

I am of the opinion, however, that by the words "first list established" the Legislature did not intend, in enacting said chapter 271, your departmental interpretation of the said words being presumably known to them, that they should embrace within their scope a list established as a result of an earlier examination which an applicant was not eligible to take, even if such list were older than one or more lists established as a result of an examination which he would have been able to take except for his absence due to service with the United States forces. It was intended that such an applicant should be placed upon the first list es-

tablished as a result of the examination *which he would have been eligible to take*, and that the construction which you have put upon said words is correct.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Soil Conservation — Committee — Districts — Scope of Authority — Supervisors.

AUG. 12, 1946.

Hon. FREDERICK E. COLE, *Commissioner of Agriculture.*

DEAR SIR: — In a recent letter you have asked my opinion upon a number of questions involving the construction of G. L. (Ter. Ed.) c. 128B, inserted by St. 1945, c. 531. The Attorney General, following a long line of practice and procedure, does not attempt to make general interpretations of statutes not necessary to the correct performance of any specific duty immediately required of the head of a department.

For your guidance, however, in relation to the carrying out of the provisions of said statute under which you are the chairman *ex officio* of the newly established "State Soil Conservation Committee," let me say that the "Soil Conservation Districts" established under the statute are, as the words are ordinarily used, "political subdivisions of the Commonwealth" and like "improvement" and other districts provided for by the Legislature are *quasi* corporations to which certain powers are granted (*Costello* v. *North Easton Village District*, 205 Mass. 54).

"District supervisors" appointed by the said committee or elected by the voters of the district under the terms of said statutes do not, from the context of the measure, appear to be officers of the Commonwealth. No particular provision is made for their taking an oath of office, and it would not seem, therefore, that they are required so to do.

It is provided in section 7 that the supervisors of a district shall have a common seal, and it would seem as a necessary implication from such authorization that the supervisors of each district should have a common seal and use it upon all documents given by them on which a seal is required.

As to the personal liability of the district supervisors, as to which you have asked, inasmuch as they are public officers they will not be liable as such for wrongs for which the district as a *quasi* corporation may be liable, but like all public officers may be liable in actions of tort under certain circumstances for wrongs committed by them individually outside the scope of their authority.

The activities of the several "districts" thereunder do not from the context of the measure appear to be activities of the Commonwealth, and, consequently, no duty lies upon the State Auditor to audit their several accounts (G. L. (Ter. Ed.) c. 11, § 12). The duty to audit such accounts is not by any provision of the said statute placed upon any other official, nor are the accounts of such districts included in any other statutes of which I am aware among those required to be audited by any other designated official or officials, including the State Soil Conservation Committee. Moreover, in section 6 of said statute, the Legislature has provided that the "supervisors shall provide . . . for an annual audit of the accounts of receipts and disbursements." It would seem, therefore, that

the supervisors in each district should themselves provide for an annual audit by recognized and experienced officers.

By section 7, paragraph 7, of said statute the district supervisors are authorized to accept contributions both from the Commonwealth and from various other sources, public and private. Authority to accept contributions from sources other than the Commonwealth does not appear to have been given to the State committee, and its authority to allot money appears to be limited to that appropriated by the General Court (said c. 128B, § 3).

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — Transfers — Change in Employment from Park to Sewerage Division of Metropolitan District Commission.

AUG. 26, 1946.

Hon. W. T. MORRISSEY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have asked my opinion as to whether a change in employment of an engineer in your department from the Park Division to the Sewerage Division or vice versa would constitute a transfer within the provisions of the Civil Service Law so as to require notice to the employee and consideration as to seniority.

I am of the opinion that such a change in employment would constitute a transfer subject to the provisions of the Civil Service Law.

The Park Division and the Sewerage Division are separate divisions within the Metropolitan District Commission, established by law under authority of G. L. (Ter. Ed.) c. 28, § 3, each having its own director.

While the Metropolitan District Commissioners are given authority to transfer or remove employees, including engineers, by section 4 of said chapter 28, nevertheless, the context of said section 4 shows plainly that transfers and removals are to be made subject to the provisions of G. L. (Ter. Ed.) c. 31, the Civil Service Law, since exemption from the terms of said chapter 31 is given in said section 4 specifically to a single employee only, the secretary.

Transfers are referred to in the Civil Service Law (said c. 31, § 16A, as amended by St. 1945, c. 703) with relation to transfers assented to by the employee, and the phrase "and the approval and consent of *the appointing authority in the department* or departments involved" thus indicates a legislative intent that a "transfer" may be made within a single department as well as between two departments.

There is nothing in the phraseology of section 43 of said chapter 31, as amended by St. 1945, c. 667, wherein transfers are also referred to, to indicate that the word "transfer" is used in any different sense than in said section 16A, both sections having been reenacted by amendment in their present form in the same year, 1945.

Said section 43 of chapter 31, as thus amended, in its applicable parts provides:

"Every person holding office or employment . . . shall not be discharged, removed . . . transferred from such office or employment without his consent, . . . except for just cause and for reasons specifically given him in writing. . . ."

Rule 27 of the Civil Service Rules and Regulations has been rendered ineffective by the passage of the said amending act of 1945.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — Promotions — Seniority.

AUG. 26, 1946.

Hon. WILLIAM T. MORRISSEY, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have asked me to "clarify . . . the meaning of chapter 103 of the Acts of 1946 as it applies to provisional and permanent promotions." You have further asked me to give you "a ruling on the meaning of paragraph A of chapter 103 as it pertains to the number of eligible employees in the engineering department; that I may select from, in making three permanent promotions from one grade to the next higher grade. All the employees under consideration are now in the same grade and have been permanently employed in this grade for more than three years."

The Attorney General, following a long line of practice and procedure of his predecessors in office, does not give opinions as to the general interpretation or meaning of statutes.

For your guidance, however, let me say that there is no provision of the Civil Service Law which authorizes you to promote *provisionally* any permanent employee *to the next higher grade* than that in which he is now working. The provisions of St. 1946, c. 103, provide for provisional appointment but not for provisional promotion.

In making selection of an employee to be promoted under G. L. (Ter. Ed.) c. 31, § 15, paragraph A, as inserted by said chapter 103, from those in the next lower grade, the number of those who may be eligible is not of consequence. They are to be selected according to seniority in "length of service." The quoted phrase as now employed in said section 15, paragraph A, as amended, means length of service with the Commonwealth or a political subdivision thereof as defined in G. L. (Ter. Ed.) c. 31, § 15, paragraph D, as amended, not merely in the grade where presently at work. This is made plain by the fact that said section 15, before its recent amendments, provided that seniority for the purpose of such selection from a lower grade was to be based on "length of service *therein*," "therein" obviously referring to the lower grade itself. The omission of the word "therein" from the statute as it now reads indicates a plain legislative intent that such seniority is to be seniority in the Commonwealth's service or that of its political subdivisions, and not in that of the particular lower grade from which promotion is contemplated.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Public Welfare Employee — Retention after Seventy under St. 1941, c. 634.

Aug. 27, 1946.

Hon. Patrick A. Tompkins, *Commissioner of Public Welfare.*

Dear Sir: — You have asked my opinion as to whether you have the right to continue in employment a person engaged in carrying out the provisions of St. 1941, c. 634, who is now over the age of seventy and who by reason of his age at the time of appointment to his original position in your department, has never been a member of the State Retirement System.

St. 1941, c. 634, § 1, the applicable portion of which you have quoted in your letter, specifically provides that the laws governing the employment, discharge and retirement of employees of the Commonwealth, including those of civil service, shall not apply to any person engaged in carrying out any provision of said chapter which relates to the distribution of surplus agricultural commodities donated by the Federal authorities. This chapter appears to be still in force and by virtue of the foregoing provisions the said employee may be retained in service despite his age. His right to be employed, in view of the specific provisions of said chapter 634, to which I have referred, has not been affected by St. 1942, c. 16, or St. 1945, c. 55, regarding the employment of retired employees.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Retirement — Teacher — St. 1946, cc. 418, 425.

Sept. 3, 1946.

Hon. John J. Desmond, Jr., *Commissioner of Education.*

Dear Sir: — In a recent letter with relation to the retirement of a certain teacher you have written me as follows:

"Under the provisions of St. 1946, c. 425, the retirement of Miss M. Marion Watts by the School Committee of Northbridge is permitted, her retirement to be subject to the approval of the Teachers' Retirement Board. If retirement is approved, she is to receive from the date of approval by the Teachers' Retirement Board the retirement allowance established under G. L. c. 32, § 10, pars. 9 and 10, as in effect immediately prior to January 1, 1946.

"In accordance with the law as stated above, the pension would be the minimum pension which added to the annuity to which she will be entitled under Option (a) will provide a total retirement allowance of $400 a year.

St. 1946, c. 418, increases the minimum pension for certain public school teachers who retired on or before December 31, 1945. The Retirement Board is of the opinion that Miss Watts is not entitled to the increase provided by Chapter 418 as her retirement will not take effect until approved by the Teachers' Retirement Board in 1946. The Board, however, feels that it would like your opinion regarding this matter in order that no injustice may be done Miss Watts when her retirement allowance is established."

You have also informed me that this teacher was a member of the Teachers' Retirement Association.

I am of the opinion that the teacher is entitled to receive the retirement allowance established under G. L. (Ter. Ed.) c. 32, § 10, as in effect immediately prior to January 1, 1946, and not the larger retirement allowance payable under St. 1946, c. 418.

Said chapter 418 is a general law, which contained an emergency preamble, approved on June 5, 1946. It reads:

"From June first, nineteen hundred and forty-six, members of the Teachers' Retirement Association retired under section ten of chapter thirty-two of the General Laws, as in effect on December thirty-first, nineteen hundred and forty-five, or corresponding provisions of earlier law, shall receive a retirement allowance at the annual rate which they would have received if, at the time of their retirement, the minimum pension under paragraphs (4), (5) and (10) of said section, or corresponding provisions of earlier law, had been the annual amount of pension which, when added to the annual amount which would have been paid from the annuity fund if the member had chosen an annuity under paragraph (3) (*a*) of said section, or corresponding provisions of earlier law, would have provided a retirement allowance of six hundred dollars."

St. 1946, c. 425, is a special law, approved on the same day as said chapter 418, which specifically authorizes the retirement of the teacher in question under certain conditions "in accordance with the provisions of paragraphs (8) and (13) of section ten of chapter thirty-two of the General Laws, as in effect immediately prior to January first, nineteen hundred and forty-six."

Said chapter 425, section 2, further prescribes that the particular teacher to whom the act applies, and whose retirement is authorized as aforesaid by its first section, shall, upon such retirement, receive "the retirement allowance which she would have received under paragraphs (9) and (10) of said section 10 of said chapter thirty-two, as in effect immediately prior to January first, nineteen hundred and forty-six."

Since the teacher to whom said chapter 425 is applicable is to be retired by its terms "in accordance with the provisions of . . . section ten of chapter thirty-two of the General Laws, as in effect immediately prior to January first, nineteen hundred and forty-six," she would appear to be in the same class as the teachers referred to in said chapter 418, and the special provisions for the amount of her allowance in said chapter 425 would appear to be inconsistent with those set up for teachers of that class in said chapter 425.

Statutes should be construed when possible so as not to conflict and to form an harmonious whole. These two statutes at first sight appear to be irreconcilable.

It has been suggested that the title of said chapter 418 indicates that it is limited in application to teachers who retired on or before December 31, 1945, and so could not have application to the teacher to be retired under said St. 1946, c. 425. This title reads:

"An Act to increase to six hundred dollars the minimum pension provided for certain public school teachers who retired on or before December thirty-first, nineteen hundred and forty-five."

The title of an act may be used as a guide in determining the intention of lawmakers and may be considered in construing an act. *Wheelwright* v. *Trefry*, 235 Mass. 584. *Brown* v. *Robinson*, 275 Mass. 55.

But the use of words in the title of a statute cannot be held to control, enlarge or limit the words or the scope of the statute unless such words are of doubtful or ambiguous meaning. *Lorain Steel Co.* v. *Norfolk & B. St. Ry.*, 187 Mass. 500, 505. *Charles I. Hosmer, Inc.*, v. *Commonwealth*, 302 Mass. 495, 501. *Opinion of the Justices*, 309 Mass. 631, 640.

The words employed in the text of said chapter 418 are not of doubtful or ambiguous meaning. The provisions of said chapter 418 apply to all members of the Teachers' Retirement Association who are retired under said G. L. c. 32, § 10, as such statute was in effect before 1946, *irrespective of the time of retirement*. To this class of teachers the teacher in question belonged and she would appear to be entitled on retirement to the allowance established by said chapter 418 were it not for the explicit provisions of said chapter 425 setting forth another form of allowance which she was to receive.

However, said chapter 425 is a special law and in so far as its terms are inconsistent with those of said chapter 418, which is a general law, it is to be regarded as setting forth an exception from the provisions of the general law, made by the Legislature with relation to the particular subject matter of the special act, and as such it is effective with regard to such particular subject matter irrespective of the provisions of the general law. In so far as it may be regarded as inconsistent with provisions of the general law, the special act is operative notwithstanding. *Townsend* v. *Little*, 109 U. S. 504; *Stoneberg* v. *Morgan*, 246 Fed. 98; *Jackson* v. *Cravens*, 238 Fed. 117; and see *Clancy* v. *Wallace*, 288 Mass. 557, 564; *McKenna* v. *White*, 287 Mass. 495, 499.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement — Teachers' Pensions — Reimbursement of City of Boston under G. L. (Ter. Ed.) c. 32, § 20 (2) (c).

SEPT. 3, 1946.

Hon. JOHN J. DESMOND, Jr., *Commissioner of Education.*

DEAR SIR: — In a recent letter you have asked my opinion as to whether the obligation of the Commonwealth under G. L. (Ter. Ed.) c. 32, § 20 (2) (*c*), as amended, to reimburse the city of Boston for certain pensions paid to teachers upon retirement, is affected, as to increased pensions paid by the city under the provisions of St. 1908, c. 589, § 7, as most recently amended by St. 1945, c. 685, § 2, by section 3 of said chapter 685.

I am of the opinion that such obligation to reimburse for pensions so paid is not affected by the provisions of said section 3.

Said section 3 reads:

"Until the expiration of one year from the effective date of this act, but not thereafter, the entire amount of the increases in pensions authorized by the amendments to sections six and seven of chapter five hundred and eighty-nine of the acts of nineteen hundred and eight, as amended, made by sections one and two of this act shall be paid from the permanent

school pension fund established and existing under authority of section one of said chapter five hundred and eighty-nine, as amended, and no part of any such increase shall be paid from any other source whatsoever."

The permanent school pension fund consists of money of the city of Boston earmarked for the payment of teachers' pensions by authority of earlier statutes. The duty of the Commonwealth to reimburse for pensions is laid down in said G. L. (Ter. Ed.) c. 32, § 20, (2) (*c*), as amended.

Section 3 of said chapter 685, quoted above, requires that the increases in pensions authorized by said section 7 as amended "*shall be paid from* the *permanent* school pension fund . . . and no part of any such increase shall be paid from any other source whatsoever."

The pensions are *paid* by the city of Boston and the requirement of the statute that they shall be paid from the fund and from no other source is a mandate applicable only to the city and does not purport to apply to the Commonwealth nor to the latter's duty to reimburse the city. Payment and reimbursement are two distinct and different things, and said section 3 contains in its phraseology no provision applicable to reimbursement.

If, as has been suggested, it was meant by the Legislature to relieve the Commonwealth, at least for a time, from the obligation to reimburse the city for the whole or any part of the increased pensions authorized under said section 7 as amended, it doubtless would have so indicated its intent by the use of some phrase such as: "No reimbursement by the Commonwealth shall be made for the increased amount of such pensions for the first year."

The Legislature, however, has not included any such provision in said section 3 or in any other part of the applicable statute, either explicitly or by reasonable implication.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Aeronautics Commission — Regulations — Certificates of Convenience — Necessity of Intrastate Scheduled Air Carriers.

SEPT. 4, 1946.

MR. EDWARD J. LYNCH, *Chairman, Massachusetts Aeronautics Commission.*

DEAR SIR: — You have requested my opinion upon the following questions relating to intrastate transportation of persons or property by aircraft:

"1. Does St. 1946, c. 583, § 3, which amends G. L. c. 90, § 39, authorize or empower this Commission to establish by order or regulation provisions for the issuance of certificates of convenience or necessity covering the establishment or operation of intrastate scheduled air carriers?

"2. If not, to what extent do the provisions of this act authorize regulations or control of such enterprises?"

I answer your first question in the negative.

The new section 39 of G. L. c. 90, as inserted by St. 1946, c. 583, is as follows:

"The commission shall have general supervision and control over aeronautics and shall have general supervision of the construction, mainte-

nance and operation of all air navigation facilities and airports, including airport buildings owned by the commonwealth, except as otherwise provided by law. Subject to the approval of the governor, the commission may represent the commonwealth in matters relative to aeronautics before boards, commissions, departments or other agencies of the federal government and other states and international conferences, and before committees of the Congress of the United States. For the purpose of carrying out the provisions of sections thirty-five to fifty-two, inclusive, and for the purpose of protecting and insuring the general public interests and safety, and the safety of persons receiving instructions concerning, or operating or using, aircraft and of persons and property being transported in aircraft, and for the purpose of developing and promoting aeronautics within the commonwealth, the commission may perform such acts, may issue and amend such orders and may with the approval of the governor and council, make and amend such reasonable general or special rules and regulations as it deems necessary; provided, however, that such rules and regulations shall not be inconsistent with, or contrary to, any act of the Congress of the United States relating to aeronautics or any regulations promulgated or standards established pursuant thereto. No rule or regulation of the commission shall apply to airports, restricted landing areas, or air navigation facilities owned or operated by the United States within the commonwealth."

There is in that section no specific reference to any power of your commission to establish by orders or regulations provisions for the issuance of certificates of convenience and necessity for the establishment or operation of intrastate airlines, nor can there be found any sufficiently specific or clear warrant by inference for such regulations when that section is read together with sections 35 to 52, inclusive, of chapter 90, as amended.

The intent of the Legislature would need to be more clearly established to justify the institution of such economic control of intrastate airlines than can be pieced together from the broad and general language of the third sentence of section 39 which grants your commission rule-making power for the purpose of "protecting and insuring the general public interests and safety, and the safety of persons receiving instructions concerning, or operating or using, aircraft and of persons and property being transported in aircraft, and for the purpose of developing and promoting aeronautics within the commonwealth. . . ." The emphasis is upon safety: safety for the general public, safety for persons operating aircraft and safety for persons and property being transported in aircraft.

That the Legislature is familiar with the apt terminology which clearly expresses its intent to create powers for granting certificates of convenience and necessity in other forms of transportation is distinctly shown in G. L. (Ter. Ed.) c. 159B, § 3, as most recently amended by St. 1945, c. 400, §§ 1, 2. That section empowers the Department of Public Utilities to issue certificates of convenience and necessity to persons engaged in the business of a common carrier by motor vehicle only upon application to the department and after a public hearing to determine whether the applicant is "fit, willing and able" to perform, and that the service applied for is necessary and convenient. It also contains further detailed provisions as to routes, limitations, conditions, etc.

Likewise, the Legislature used definite words expressing its intent that the Department of Public Utilities has power to issue certificates of convenience and necessity for common carriers of passengers by motor vehicle,

G. L. (Ter. Ed.) c. 159A, § 7, for railroads, G. L. (Ter. Ed.) c. 160, § 17, and for street railways, G. L. (Ter. Ed.) c. 161, § 7.

Furthermore, the Legislature had before it in 1945 House Bill 176, entitled, "An Act regulating common carriers by aircraft," accompanying the seventeenth recommendation of the Department of Public Utilities, House Bill 159, which bill the Legislature saw fit to reject. That bill was elaborate in detail as to the authority proposed to be given to your commission to issue certificates of convenience and necessity to such operators who applied and, upon public hearing, appeared "fit, willing and able" to perform carriage by aircraft of persons or property for hire in intrastate commerce in this State. It was, in effect, the model bill drafted and proposed by the National Association of Railroad and Utility Commissioners in 1944 and which was adopted in 1945 by Alabama,[1] Arkansas,[2] and Vermont,[3] with only slight variations. That bill also bears a notable resemblance to the economic regulations of the Federal Civil Aeronautics Act of 1938.[4]

In view of the foregoing facts, it would therefore appear that the Legislature could not have intended that section 39 would create in your commission the power of such economic control of intrastate airlines as to issue or withhold certificates of convenience and necessity for their maintenance, operation or establishment.

Your second question is so broad in scope that it is impossible to give a specific answer to it. In general terms, however, section 39 can be said to give your commission general power to supervise by regulation, rules and orders the operation of aircraft and air navigation facilities, other than those owned or operated by the Federal Government, in this Commonwealth with regard to the general public interests and safety (which includes all persons and property interests aground or airborne) and the safety of those persons either operating, being transported, or having their property transported in aircraft, subject always to the restriction "that such rules and regulations shall not be inconsistent with, or contrary to, any act of the congress of the United States relating to aeronautics or any regulations promulgated or standards established pursuant thereto."

The only existing provision in our laws for economic regulation of intrastate airlines in this Commonwealth is found in G. L. (Ter. Ed.) c. 159, § 14A (inserted by St. 1941, c. 713), which requires every common carrier by aircraft maintaining an established service over regular scheduled routes for general public service to publish and file with the Department of Public Utilities tariffs of its rates and charges for transportation, and services in connection therewith, between points within the Commonwealth.

You have called my attention to the jurisdiction of the Federal Civil Aeronautics Board over interstate airlines with the statement that "it does not presently exercise direct jurisdiction over intrastate airlines." Lest there be any misunderstanding in regard to the authority of the Federal Board, it should be pointed out that the Civil Aeronautics Act of 1938 (52 St. 977, 49 U. S. C. A., §§ 401–681), from which the board takes its being, was passed under the authority of the commerce clause of the United States Constitution, Art. I, Sect. 8, cl. 3. The act has two defi-

[1] Governor's Act No. 269, Alabama Acts, 1945, H.B. 302.

[2] Arkansas Laws, 1945, Act No. 252.

[3] Vermont Laws, 1945, H. B. 189.

[4] Act of June 28, 1938, 52 St. 977, 49 U. S. C. A. § 401.

nite aspects, safety regulation and economic regulation. The jurisdiction of the board covering safety regulation applies to "air commerce," which is defined in the act to mean "interstate, overseas or foreign air commerce, or the transportation of mail by aircraft, or any operation or navigation by aircraft within the limits of any civil airway, or any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate, overseas or foreign air commerce." On the other hand, the jurisdiction of the board covering economic regulations applies to "air transportation," which is defined in the act to mean "interstate, overseas or foreign air transportation, or the transportation of mail by aircraft."

It can be seen that the field of safety regulation, which includes such items as flight rules and licensing of all airmen and aircraft, is much broader than the field of economic regulation. As a matter of fact, the Federal courts in two recent cases have sustained the claim of the Civil Aeronautics Board to the application of the safety provisions of the act to purely intrastate operations, *Rosenhan* v. *United States*, 131 F. (2d) 932, (C. C. A. 10th 1942) *cert. denied* 318 U. S. 790, *United States* v. *Drumm*, 55 F. Supp. (D. Nov., 1944) 151.

The first case involved the intrastate flight of an aircraft within a Federally-designated airway without a Federal certificate of airworthiness. The second case involved an operator without a Federal license, who made two unscheduled flights wholly outside of any civil airway, one of which flights was entirely intrastate. The court in the *Rosenhan* case determined that Congress did not limit the question of safety to a manifestation of actual danger, but rather that it could and did exert its power to eliminate all potential elements of danger to interstate and foreign operations.

The economic regulation of "air transportation" under the Federal act, Title IV, is not as broad in jurisdictional scope. These sections of the act require certificates of convenience and necessity for those applicants found fit, willing and able to perform, authorize establishment or modification of routes, rates and charges, require annual accounts, records and reports of each carrier, provide charges for carriage of mail, prohibit interrelated ownership and control of carriers, and other similar provisions bearing on economic supervision. They apply now only to interstate, foreign and mail transportation by aircraft.

Despite this limitation, however, the Federal Civil Aeronautics Board has proceeded to enforce the economic provisions of the act in the case of a carrier operating wholly within the State of New York between New York City and Niagara Falls, on the theory that the carrier was being used by passengers as a leg of an interstate journey. *Civil Aeronautics Board* v. *Canadian Colonial Airways*, 41 F. Supp. 1006 (U. S. D. C., S. D. N. Y., 1940). The reported case goes no further than sustaining the board's motion for a court order to allow the board to examine the books of the airline and to interrogate its passengers in support of its burden of proving that interstate commerce was engaged in.

In summary, it is my opinion that G. L. (Ter. Ed.) c. 90, § 39, as most recently amended by St. 1946, c. 583, § 3, does not empower your commission to issue certificates of convenience and necessity to scheduled intrastate airlines, but that the act does empower your commission to supervise the operation of aircraft and air navigation facilities, other than those owned or operated by the Federal Government, in this Common-

wealth with regard to the general public interests and safety and the safety of persons and property in aircraft, provided that such supervision shall not be inconsistent nor contrary to the Federal act or regulations thereunder.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Salary of Justice of Newburyport District Court.

SEPT. 12, 1946.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have asked my opinion as to the amount of salary payable to the justice of the Newburyport District Court under the provisions of St. 1946, c. 348, and St. 1946, c. 498.

Said chapter 348 was approved May 21, 1946, and as it bore an emergency preamble it became effective at once, but the increases in salary provided for by section 4 of said chapter 348 were not "to be effective" until July 1, 1946.

You state that on July 1, 1946, the salary of the said justice was $2300. Under the provisions of said chapter 348 that was increased, as of such date, by twenty per cent of the amount not to exceed $420 plus $150, making a total salary payable from July 1, 1946, under the terms of said chapter 348, of $2870, if the salary of the justice was not increased by the General Court.

The provisions of said section 4 of chapter 348 are not limited to granting an increase of twenty per cent on salaries as they stood on May 21, 1946, nor as they stood on July 1, 1946. The terms of said section 4 provide for the twenty per cent increase and the $150 additional as an increase in "the salary of a justice . . . of a district court." The sentence contained in said section 4 which provides, "Such salary as so increased shall be deemed to be the regular compensation of any such officer or employee now or hereafter in the service of the county," has no effect to cut off the twenty per cent increase plus the $150 additional from any salary mentioned in said section 4 which may at a later date be increased by the Legislature. The terms of said section 4 cannot prevent the Legislature from exercising its authority to increase a salary, and it would appear to be the plain intent of the section that "the salary" of a justice, whatever it might be at any time, should be increased by twenty per cent up to $420 plus $150, after July 1, 1946.

By St. 1946, c. 498, the salary of the said justice was increased from said $2300 to $3000. After July 10, 1946, the provisions of the earlier statute, said chapter 348, would apply to this new salary and it would thereby be increased by twenty per cent up to $420 plus $150, or a total of $3570.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Tuition of Resident and Non-resident pupils — Veterans — Servicemen's Readjustment Act of 1944.

SEPT. 12, 1946.

Hon. JOHN J. DESMOND, Jr., *Commissioner of Education.*

DEAR SIR: — Replying to your letter of September 4, 1946, let me say that where the Legislature has permitted the establishment of tuition for resident and "non-resident" pupils, respectively, and tuition for each group has been established by those in authority over an institution on such basis in different amounts, I do not perceive how a certificate can properly be given which states:

"That such charge (i.e., a non-resident charge for a veteran who may be a resident of the Commonwealth) is not in conflict with existing laws or other legal requirements of the Commonwealth."

You state that such a certificate is required by the Federal authorities as a prerequisite to paying the non-resident charge for veterans as pupils, irrespective of whether the veterans are residents or non-residents of the Commonwealth.

It would seem that the Federal Administrator under the Servicemen's Readjustment Act of 1944 (78th Congress, Public Law 346) might, if the "resident" charge be inadequate, pay for resident veterans a sum equal to the "non-resident" charge under the provisions of section 5 of said Public Law 346, Title II, chap. IV, Part VIII, which reads in part:

". . . that if any such instruction has no established tuition fee, or if its established tuition fee shall be found by the Administrator to be inadequate compensation to such institution for furnishing such education or training, he is authorized to provide for the payment, with respect to any such person, of such fair and reasonable compensation as will not exceed $500 for an ordinary school year."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Offices of Registers of Probate — Saturday Closing — Departments of the State Government.

SEPT. 27, 1946.

Hon. THOMAS H. BUCKLEY, *Chairman, Commission on Administration and Finance.*

DEAR SIR: I am in receipt from you of the following communication:

"The question has arisen as to the application to the offices of registers of probate of St. 1946, c. 408, an act relative to the closing of offices of state departments on Saturdays.

"Will you kindly advise us whether or not, in your opinion, the act applies to registers of probate as 'offices under the jurisdiction of any department of the state government.'"

I must advise you that G. L. (Ter. Ed.) c. 30, § 24, as amended by St. 1946, c. 408, does not apply to the offices of registers of probate.

Said section 24 as so amended is by its terms made applicable only to "all offices under the jurisdiction of any department of the state government."

The words "*any department of the state government*" as employed by the Legislature in said chapter 408, which amends G. L. (Ter. Ed.) c. 30, by striking out section 24 therefrom and inserting a new section 24, were plainly intended to refer not to one of the three principal divisions of governmental power, the executive, legislative or judicial, but to one of the subdivisions into which the executive and administrative functions of the state government are divided (Const. Amend. LXVI). See *Yont* v. *Secretary of the Commonwealth*, 275 Mass. 365, 367.

That such was the intention of the Legislature is made plain by the employment in said section 24, as amended, of the phraseology "the department head" and "any department head." There is no head of the judicial department of the Commonwealth, using the word "department" in its broadest sense.

Moreover, the intent with which the words under consideration were used by the Legislature is manifest from the definition of "departments" in section 1 of said chapter 30, in which the new section 24 is inserted. Said section 1 reads as follows:

"The word 'departments,' as used in this chapter, except in section two, shall, unless the context otherwise requires, mean all the departments of the commonwealth, except the departments of banking and insurance and of civil service and registration but including in lieu thereof the divisions of banks and loan agencies, of insurance, of savings bank life insurance and of civil service and the several boards serving in the division of registration of the department of civil service and registration, and also including the metropolitan district commission and the commission on administration and finance."

There is nothing in the context of said section 24 as inserted by said chapter 408 which requires that a different meaning shall be given to the word "department" than that set forth in said section 1; rather, it would appear from such context itself that the word was intended to have the meaning set forth in said section 1.

Specific provision has been made by the Legislature under the authority of the Constitution, Pt. 2d, c. III, art. IV, for the times when the probate courts shall and shall not be open, and no court may be held unless a register or an assistant or temporary register is present (G. L. (Ter. Ed.) c. 215, §§ 58–62).

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

State Examiners of Electricians — Applications — Credits to Veterans — St. 1946, c. 408.

SEPT. 27, 1946.

State Examiners of Electricians.

GENTLEMEN: In a recent letter you have directed my attention to St. 1946, c. 480, § 2, which inserts a new section 2A in G. L. (Ter. Ed.) c. 141. In its applicable part this new section provides:

". . . They (the Board of Examiners of Electricians) shall grant a credit of five per cent to the examination standing of each applicant who has served in the army or navy of the United States in time of war and has been honorably discharged or released from active duty; provided,

that such applicants make application within one year of their discharge or release as aforesaid or within one year of the effective date of this section, whichever is the latest. Said examinations shall be sufficiently frequent to give ample opportunity for all applicants to be thoroughly and carefully examined, may be written or in practical work, and may be supervised by one or more of the examiners, but no license shall be granted without the sanction of the examiners."

In relation to said section 2A you have asked my opinion upon four questions.

1. Your first question reads:

"Does the word 'application' as used in the phrase 'provided, that such applicants make application within one year of their discharge or release . . .' refer to the written application required by chapter 141, section 3, paragraph 3, to be made by all persons desiring an examination, or does it require that those eligible for the 5% credit must make application for such credit?"

G. L. (Ter. Ed.) c. 141, § 3, par. 3, to which you refer, provides in its applicable part:

"Persons desiring an examination shall make written application therefor, accompanied by the proper fee . . ."

I am of the opinion that the word "application", as used in the phrase quoted in your question, refers to the application mentioned in said chapter 141, section 3, paragraph 3, which is an application to take an examination. It would appear from the phraseology of said section 2A that it was the intent of the measure that veterans taking the examination should be entitled to a five per cent credit and that the receipt of such credit did not depend upon a request for it made by a veteran but was available to all alike who made application to take the examination within the stated time.

2. Your second question reads:

"Shall the five per cent credit be granted to the examination standing of applicants who apply during the one year specified in the act but who fail the examination and who apply for re-examination after the expiration of said year as provided in chapter 141, section 3, paragraph 3?"

Chapter 141, section 3, paragraph 3, to which you refer in your question, provides in its applicable part:

". . . An applicant failing in his examination shall not have his fee returned to him, but shall be entitled to one free re-examination . . ."

Inasmuch as a re-examination follows as a result of an "application" and as the provisions of said section 2A grant the five per cent credit to those who make the application within the stated time, I am of the opinion that such credit is to be given to such applicants who make their applications within the stated time upon re-examination as well as upon the original examination, irrespective of the date of the re-examination.

3. Your third question reads:

"Shall the five per cent credit be granted to the examination standing of a person who applies for examination for a 'Certificate A' in behalf of

a firm of which such person is a member or in behalf of a corporation of which such person is an officer as provided in chapter 141, section 3, paragraph 1?"

Said section 2A makes no distinction between applicants applying for examination for Certificate A and those applying for examination for Certificate B, the only other certificate mentioned in said chapter 141, section 3, paragraph 3. I therefore answer your third question in the affirmative.

4. Your fourth question reads:

"Shall the five per cent credit be granted to the examination standing of a person who was examined prior to the effective date of the act, i.e., June 7, 1946?"

It is a general principle of law that in the absence of an expression of a legislative intent that a statute shall have a retroactive application, it is to be construed as having a prospective operation only. *Martin L. Hall Co.* v. *Commonwealth*, 215 Mass. 326; *Wynn* v. *Board of Assessors*, 281 Mass. 245; *Smith* v. *Freedman*, 268 Mass. 38; *City of Haverhill* v. *Marlborough*, 187 Mass. 150.

I therefore answer this question to the effect that the five per cent credit is to be granted to veterans who are eligible therefor upon examinations held after and not before the effective date of said St. 1946, c. 408.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

United States Naval Reserve Officer on Inactive Duty — Payment of Renewal Fee for Engineer's License.

SEPT. 27, 1946.

MRS. MAE MANNING, *Director of Registration.*

DEAR MADAM: — I am in receipt from you of the following request:

"The Board of Registration of Professional Engineers and of Land Surveyors respectfully request your opinion on the following:

"One of our registered engineers who is a reserve officer in the Navy and who was placed on inactive duty Sept. 1, 1945, has protested paying his renewal fee of $2.00. He claims that he is in the service until peace has been declared and that he is entitled to a suspension of his renewal fee until six months after peace has been declared.

"Chapter 708 of the Acts of 1941, Section 23: He bases his claim on the following excerpt from this citation: ' . . . may be renewed within six months after the termination by such holder of such service.'

"The Board would like to know if the placing on inactive duty may not mean the termination of such service."

I am informed that a United States Naval Reserve Officer, although on inactive duty, is not, under the rules and practice of the Navy Department, regarded as having terminated his service but is treated as still in the naval service and liable to be activated until he has received a discharge and a certificate of service.

This being so, the engineer to whom you refer is entitled to a renewal of his registration without the payment of a two-dollar fee.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Registration of Engineers — Civil Service Classification.

SEPT. 27, 1946.

Mrs. MAE MANNING, *Director of Registration.*

DEAR MADAM: — The Board of Registration of Professional Engineers and of Land Surveyors has through you in a recent letter asked my opinion as to whether they should register a certain State employee as an engineer under the provisions of St. 1941, c. 643, § 4.

Said section 4 in its pertinent part provides:

" . . . Engineers in state or municipal service qualified as civil, mechanical, designing, electrical, or sanitary engineers under the civil service laws of the commonwealth upon the effective date of this act shall be eligible to register as a professional engineer. . . ."

A classification of an employee by the Civil Service Division in Class 27, which class under the rules and regulations of the division is composed of "civil, designing, electrical, mechanical and sanitary engineers," sufficiently indicates that such employee is "qualified" as an engineer, so that it is the duty of your board upon his application made within the time allowed by the said act to register him, as you have been previously advised.

You inform me that the employee whose case is now under consideration has heretofore been classified by the Civil Service Division in Class 11 but that the division has recently reclassified him, placing him in said Class 27, and has made such new classification retroactive to 1936.

The effect of the order of said division making the reclassification retroactive is to indicate that the employee at all times since 1936 has been properly entitled to classification in said Class 27 as an engineer. The reclassification as made rectifies an error of the division and indicates that the employee was "qualified" as an engineer in the State's service in 1942, as well as at the present time.

I am of the opinion, therefore, that this employee, upon an application made within the time limited by said chapter 643, is entitled to be registered now.

No responsibility such as you mention in your letter will attach to the board by reason of some lack of specific attainments or requirements of the board on the part of the employee, since the Legislature in said section 4 has required the registration of "engineers in state . . . service qualified as . . . engineers . . . under the civil service laws . . ."

The Legislature has shown an intention to accept the qualification under civil service laws of engineers in the State service as the equivalent of any other attainments or requirements.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Land Ceded to Federal Government — School Children.

SEPT. 27, 1946.

Hon. JOHN J. DESMOND, JR., *Commissioner of Education.*

DEAR SIR: — Replying to your letter of September 13, 1946, let me say that the information which I have as to the dealings between the Massa-

chusetts State College and the Federal Government indicates that at the present time the status of Fort Devens as land ceded to the United States has not been altered, except that a right of entry has been given to the college for certain non-housing purposes. I am also informed that it is not proposed by the Federal Government to give more than such a right of entry in the near future for housing purposes.

The Attorney General does not pass upon questions of fact. If, however, my information in this respect is correct, children residing at Fort Devens will be living on territory ceded to the United States by the Commonwealth. This being so, the town of Ayer, under the provisions of G. L. (Ter. Ed.) c. 71, § 68, can not be required to furnish school facilities free to such children and might make an established non-resident charge to them. 1931 Op. Atty. Gen. 35; VI Op. Atty. Gen. 593; *Opinion of the Justices*, 1 Met. 580; *Newcomb* v. *Rockport*, 183 Mass. 74.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement Law — Appointment of Person over Seventy— State Official.

OCT. 3, 1946.

His Excellency the Governor and the Honorable Council.

SIRS: — In a recent letter you have asked my opinion upon the following question:

"May a person, seventy-one years of age, be legally appointed as director of the division of local taxes, in the Department of Corporations and Taxation?"

I answer your question in the negative. The provisions of G. L. (Ter. Ed.) c. 32 (the Contributory Retirement Law), as amended by St. 1945, c. 658, do not differ materially with respect to retirement at seventy years from those of said chapter 32 as it existed before such amendment.

By force of the provisions of G. L. (Ter. Ed.) c. 32, § 2 (14), (15), (16) and § 4 (*b*), prior to the said amendment of 1945, the retirement of an employee in the State service at age seventy was required. 1944 Op. Atty. Gen. 104. See *Goodale* v. *County Commissioners*, 277 Mass. 144, 150–152.

With regard to the appointment of persons over seventy under said chapter 32 as it stood before said amendment, it was said by one of my predecessors in office in 1941:

"The provisions of G. L. (Ter. Ed.) c. 32 as amended, by requiring employees reaching the age of seventy to withdraw from the public service of the Commonwealth . . . by implication prohibit the appointment to positions in such service of those who have attained the age of seventy."

The legislative intent, as expressed in the retirement law, with regard to retirement of employees at age seventy was not changed by the said amendment of 1945, chapter 658.

Under the present provisions of said chapter 32, as amended by said St. 1945, c. 658, retirement at seventy for a State employee occupying a position such as that indicated in your letter is required.

Said chapter 658, section 3 (2) (*f*), provides in its applicable parts, with certain exceptions not here relevant:

"No person who originally enters the service of any governmental unit as an employee after attaining age fifty-five . . . shall become a member (of the retirement system) . . . No such employee other than an elected official or a state official as defined in section one shall remain in the service of such governmental unit after attaining the maximum age for the group in which he would have been classified if he had become a member . . ."

Subsection (*g*) provides that "officials and general employees" are to be classified in "Group A." The phrase "maximum age" as applied to the classification of "Group A" is defined in section 1 of said chapter 658 as "age seventy."

The particular official under consideration is appointed by the Commissioner of Corporations and Taxation (G. L. (Ter. Ed.) c. 14, § 4) and is not a "state official" as those words are used in said subsection (*f*) and so is not included within the exceptions noted therein. "State official" is defined in said section 1 as "any person appointed by the governor . . ."

It follows that any person seventy-one years of age appointed to the position mentioned in your letter would by force of the terms of said subsection (*f*) be compelled to immediately cease to remain therein. Such an appointment would therefore be futile, and it may fairly be said by implication from those provisions of said chapter 658 which I have pointed out that such an appointment could not as a matter of law be effective.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — City Messenger of Chicopee — Officer — City Council.

OCT. 3, 1946.

The Commissioners of Civil Service and the Director.

GENTLEMEN: — You have, through the Director, asked my opinion as to whether the appointment of the city messenger of Chicopee is subject to the civil service law and rules.

I answer this question in the negative.

The tenure of the city messenger of Chicopee was established by St. 1924, c. 355. By the terms of such chapter the person elected to the position —

"shall hold office during good behavior and until removed by the board of aldermen in accordance with the provisions of chapter thirty-one of the General Laws and the rules and regulations made thereunder relative to removals from the classified public service."

It was also provided:

"This act shall take effect upon its acceptance by vote of the city council of said city . . ."

It is to be noted that the statute in several places refers to the position as an "office." It is also to be noted that the statute did not provide a new mode of appointment, merely referring to the election of a messenger, a method of choice previously provided for, and made civil service pro-

cedure applicable only to removal. It is further to be noted that the act calls for its acceptance by the "city council" of Chicopee.

It had previously been provided by St. 1897, c. 239, § 16, as amended, that the messenger should be elected by the board of aldermen.

By the terms of its charter the legislative function is carried out in the city of Chicopee by a board of aldermen, there being no city council.

The duties of the city messenger of Chicopee were established by Revised Ordinances of the city, chapter 17, and include such duties in connection with the board of aldermen and with the care of public buildings and polling places that his position may fairly be held to be an "office" rather than an employment. That it is an "office" seems to have been the subject of legislative determination in the provisions of said St. 1924, c. 355, already alluded to.

When a board of aldermen is the sole legislative body of a city, it falls within the scope of the words "city council" in statutes authorizing acts to be performed by a "council" (G. L. (Ter. Ed.) c. 4, § 7, First), and the board of aldermen of Chicopee was so treated by the Supreme Judicial Court in *Kaeble* v. *Mayor of Chicopee*, 311 Mass. 260.

From these considerations it follows that the city messenger of Chicopee is an officer elected by a "city council," as the quoted words are used in G. L. (Ter. Ed.) c. 31, § 5, as amended, and since it is not otherwise provided with regard to such officer in said chapter 31, he is by force of the terms of section 5 of said chapter 31 not subject to the civil service law in regard to appointment.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — Business Manager in Public Schools of Boston — St. 1946, c. 497.

OCT. 3, 1946.

The Commissioners of Civil Service and the Director.

GENTLEMEN: — You have asked my opinion as to whether or not the business manager in the public schools of the city of Boston is classified under civil service.

I answer this question to the effect that the business manager in office on the effective date of St. 1946, c. 497, who at the time of his appointment was subject to the provisions of the civil service law, still retains his civil service classification, and his rights arising from such classification are specifically prescribed by the provisions of section 3 of said chapter 497. As to any business manager who may be chosen after said date, the Legislature in said chapter 497, section 2, amending earlier statutes, has indicated an intent that he shall not be subject to the civil service law.

Under the provisions of St. 1906, c. 318, as amended by St. 1932, c. 231, the position of business manager was, like all similar positions where no contrary intent has been expressed by the Legislature, subject to the civil service law.

St. 1946, c. 497, § 2, struck out the provisions of the older statutes applicable to the business manager, above referred to, and inserted new provisions relative to appointment to the position differing materially from those in the older statutes.

These new provisions provide:

"Said committee shall choose, *upon the nomination of the superintendent of schools*, a business manager, who shall hold office until removed by the committee for cause."

The phrase "until removed by the committee for cause" would not of itself be sufficient to indicate a legislative intent to take the position in question out of the sweep of the civil service law (1944 Op. Atty. Gen. 144, 145), but the use of the words "said committee shall choose, *upon the nomination of the superintendent of schools*," requires such a departure from the mode of appointment provided by the civil service law and rules as to indicate an intention upon the part of the Legislature that persons appointed to the position after the enactment of the said chapter 497 should not be within the sweep of the civil service law (see VIII Op. Atty. Gen. 643; 1944 Op. Atty. Gen. 144, 145).

That such was the intention of the Legislature is made plain by the fact that in section 4 of said chapter 231, as amended by said chapter 497, section 2, the civil service rights of the incumbent of the position at the effective date of the amendment are preserved to him by the employment of the phrase:

"Nothing in this act shall, except as specifically provided, be deemed to affect in any manner the powers, duties, privileges, *including civil service rights*, and obligations of said business manager . . ."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Secretary of the Commonwealth — Registering Label — Radio Advertising Program.

OCT. 7, 1946.

HON. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — I am in receipt from you of the following letter:

"This office has been asked to accept for registration the form of advertising 'Your Morning Courier' for use on radio broadcasting a news program. It has not been the policy of this office to accept for registration under G. L. c. 110, § 8, any trade mark, label, stamp or form of advertisement except it be something capable of being impressed upon paper, cloth or like materials, that is to say, visual representation rather than oral.

"It is requested that you furnish this office with an opinion as to our right to accept for registration as a form of advertisement any words which would be used either exclusively in radio programs or appearing in newspaper advertising of the program in conjunction with the use over the air."

I am of the opinion that you should accept for registration the form of label set forth in your letter which is to be used as you have described.

G. L. (Ter. Ed.) c. 110, § 8, which relates to the filing of labels in your office, in its applicable parts provides:

"A person may adopt a label, . . . and file such label for record, . . . in the office of the state secretary . . . The applicant shall file with the label a certificate specifying the name of the person filing it, his residence

or place of business, the kind of merchandise to which such label has been or is intended to be appropriated, . . . *If such label* has not been and is not intended to be used in connection with *merchandise*, the particular purpose or use for which it has been or is intended shall be stated in the certificate. . . . The secretary shall file the certificate in his office and issue to the party depositing it a certificate of record under the seal of the commonwealth. . . ."

Such a label as you have referred to is capable of visible representation as well as oral, as would be the case with any label capable of being placed on file by the deposit of copies or facsimiles, as required by said section 8.

The Secretary is not called upon by the terms of the statute to consider or to determine the effect of the filing, or whether any protection will as a matter of law flow to the depositor from such filing or from the receipt of the Secretary's certificate of record thereof. It is the duty of the Secretary to receive for filing labels and certificates of depositors in apparent conformity to the statute, and to deliver to such depositors his certificates of record. *I Op. Atty. Gen. 601.*

An exhibition or fair as such is no more a concrete thing than a radio advertising program. A label to be used in connection with an exhibition or fair at the Mechanics Building reading "Boston Food Fair" was filed and certified as recorded by the Secretary, and such action was alluded to with apparent approval by the Supreme Judicial Court in *Globe Ticket Co.* v: *Boston Retail Grocers' Assn.*, 290 Mass. 235, 236.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — Authority to Promote in Watertown Fire Department.

OCT. 7, 1946.

The Commissioners of Civil Service and the Director.

GENTLEMEN: — In a recent letter the Director has asked my opinion, in connection with the receipt of a requisition for the promotion of a fireman to be a permanent captain of the Watertown fire department, as to whether the selectmen of Watertown or the "Chief of the Fire Department" has the authority to make promotions.

I am of the opinion that the authority to make such a promotion in the said fire department is vested in the selectmen.

Whatever may have been the situation with relation to the government of the Watertown fire department prior to 1912 and to the powers vested in a board of fire engineers and their appointees under the terms of St. 1839, c. 138 (now substantially embodied in G. L. (Ter. Ed.) c. 48, §§ 45–54), and St. 1855, c. 47, the enactment of St. 1912, c. 526, a special act relating to Watertown and entitled "An Act relative to the fire department of the town of Watertown," vested the power of appointment to, and removal from, the fire department in the selectmen. This statute of 1912 is still in force and reads:

"SECTION 1. The selectmen of the town of Watertown shall appoint annually in the month of April a chief engineer of the fire department who shall exercise the powers and perform the duties now provided by law for the board of fire engineers, excepting the power of appointment to mem-

bership in and removal from the permanent and call fire force of said town, which said power of appointment and removal shall be vested in the board of selectmen. The provisions of law providing for the appointment of fire engineers in towns shall not apply to the town of Watertown.

"SECTION 2. This act shall take effect upon its passage."

This statute, while granting to the "chief engineer of the fire department" the authority formerly exercised by the board of fire engineers, excepted from such authority the power of appointment and removal as to both the permanent and call forces.

This power of "appointment," as the quoted word was employed by the Legislature in the said statute of 1912, includes within its scope the power of promotion.

The Supreme Judicial Court in the recent case of *MacCarthy* v. *Director of Civil Service*, 1946 Mass. Adv. Sh. 155, 157, has considered the proper meanings to be given to the word "appointment" and has said:

"In the ordinary use of language a promotion is one kind of appointment and 'appointment' covers a promotion."

This rule of construction would also apparently apply to the word "appointment" as ordinarily used by the Legislature in statutes. *Ford* v. *Retirement Board*, 315 Mass. 492, 494.

The only exception to this rule of construction would seem from the opinion of the court in said *MacCarthy* v. *Director*, 1946 Mass. Adv. Sh. 155, 157, to be the construction to be given to the word "appointment" when used in statutes relating to the civil service as such. When used in such statutes the court held that the word "appointment" does not include promotion.

The said St. 1912, c. 526, is not a civil service statute. The civil service statute relative to the powers and duties of chiefs of fire departments, G. L. (Ter. Ed.) c. 48, §§ 42, 43, 44, and similar earlier enactments, have never, I am informed, been accepted by the town of Watertown. It is to be noted that Sp. St. 1915, c. 100, extending the provisions of civil service to the "chief of the fire department of Watertown," if applicable to the "chief engineer," the only chief which the department appears to have had under the controlling terms of said St. 1912, c. 526, does not purport to change the provisions of said chapter 526, nor is it material to the subject under discussion, for by its terms it has no application to the "appointment" of any other fireman than the "chief."

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — Group Life Insurance for Municipal Employees.

OCT. 10, 1946.

Joint Committee on Municipal Finance.

GENTLEMEN: — I am in receipt from you of the following request for my opinion:

"The Joint Committee on Municipal Finance, sitting as a Recess Committee under authority of Res. 1946, c. 40, are considering, in accordance with the said Resolve, House Bill 464. At a meeting held on Octo-

ber 1, 1946 it was voted to request your opinion as to the constitutionality of this bill if enacted into law."

The Attorney General does not pass upon questions of fact.

If there exists a sufficient factual background from which the Legislature might reasonably determine that the security afforded municipal employees through being covered by group life insurance was such as to provide for their improved efficiency as workers in the public service (see *Goodale* v. *County Commissioners*, 277 Mass. 144, 151; *Opinion of the Justices*, 1946 Mass. Adv. Sh. 799, 806), the courts would not, in my opinion, declare the measure unconstitutional if it were enacted into law by the General Court.

Such a payment as is permitted by the measure to be made by municipalities partakes of the nature either of increased compensation or of pensions like those given under the retirement systems. In either aspect, if a legislative determination similar to that which I have suggested can reasonably be made, the indicated disbursements would appear to be for a public purpose.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Commissioner of Conservation — Scope of Authority — Powers of Removal.

OCT. 17, 1946.

Hon. A. K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — I am in receipt of your letter of October 7, 1946, requesting my opinion in regard to the interpretation of certain portions of G. L. (Ter. Ed.) cc. 21 and 94.

The Attorney General, following a long line of practice and procedure of his predecessors in office, does not ordinarily give interpretations or constructions of statutes as such by way of formal opinions but limits such opinions to those bearing upon questions of law relating directly to some duty which an officer of the Commonwealth is presently called upon to perform.

I am of the opinion, however, that the requests in your present letter form an exception to the general rule in this respect, as they have a practical bearing upon the discharge of your duties as Commissioner at this time.

1. Your first question reads:

"Under G. L. c. 21, § 1, the next to the last sentence states that 'the department shall be under the supervision and control of a commissioner of conservation.' Will you kindly interpret the extent of the words 'supervision' and 'control.'"

G. L. (Ter. Ed.) c. 21, § 1, as amended, reads:

"There shall be a department of conservation, consisting of a division of forestry, a division of fisheries and game, a division of wild life research and management, a division of marine fisheries and a division of parks and recreation, each under the charge of a director. The department shall be under the supervision and control of a commissioner of conservation. The directors shall act as an advisory council to the commissioner."

The words "supervision" and "control" have been carried forward into said chapter 21, section 1, as most recently amended, from earlier statutes and indicate that the Commissioner, as head of the department, shall in a general way supervise and control its workings. They do not give to him the right to exercise special powers which may be specifically delegated to other officers in his department by the provisions of the statutes.

2. Your second question reads:

"Under chapter 21, section 3, the second sentence 'he shall supervise the work of all divisions and shall have charge of the administration and enforcement of all laws which it is the duty of the department to administer and enforce, and shall direct all inspections and investigations.' Will you please give me your interpretation of the words 'administration' and 'enforcement' in this sentence?"

G. L. (Ter. Ed.) c. 21, § 3, as amended, reads:

"The commissioner shall be the executive and administrative head of the department. He shall supervise the work of all the divisions, and shall have charge of the administration and enforcement of all laws which it is the duty of the department to administer and enforce, and shall direct all inspections and investigations. He may, unless otherwise provided, appoint such clerks and other employees as the work of the department may require, and may assign them to divisions, transfer and remove them. He may also, with the approval of the governor and council, designate employees of the department qualified by training and experience to act in the capacity of director of any of said divisions."

The words "administration" and "enforcement," as used in said section 3 in the phrase "he shall have charge of the administration and enforcement of all laws . . ." give to the Commissioner as the head of the department in a general way the administrative authority naturally pertaining to the chief executive officer of a department having "supervision" and "control" over it, as those words are used in said section 1.

3. Your third question reads:

"Under chapter 21, section 8B, a new section inserted under St. 1941, c. 598, § 6, 'the director may, subject to the approval of the commissioner, appoint and remove such experts, coastal wardens, fish inspectors, clerical and other assistants as the work of the division may require, and their compensation shall be paid by the commonwealth.' Kindly give me your interpretation of the word 'may' and if that privilege is not used, what is the authority of the commissioner in making an appointment without the director's signature?"

Said section 8B, the pertinent part of which you have set forth in your question, authorizes the Director of Marine Fisheries to appoint and remove the officials mentioned therein. By the use of the word "may" the Legislature has vested in the Director discretion as to when he shall make appointments or removals and as to the number and kind of officials whom the interests of the Commonwealth require to be appointed within the limits of appropriations provided. This authority is vested in the Director alone. The Commissioner's power of appointment and removal, given him by said section 3, is limited to situations as to which it is not

"otherwise provided." It is "otherwise provided" with relation to officials and employees in the Division of Marine Fisheries.

The Director, however, can make such appointments and removals under said section 8B only with the "approval of the Commissioner," so as to such appointments and removals the Commissioner possesses what is equivalent to the power of veto, but the Commissioner, even in the absence of action by the Director, has no power to appoint or remove the officials and employees referred to in said section 8B.

4. Your fourth question reads:

"Under chapter 21, section 8C, the first sentence 'the director shall have charge of the enforcement of chapter 130, and all other provisions of law relative to marine fish and fisheries, including shellfish, and the provisions of sections 74 to 88B, inclusive of chapter 94.' How does this fit into chapter 21, section 3, titled 'Duties of commissioner'?"

The quoted sentence in your question, which you state to be the first sentence of said chapter 21, section 8C, is taken from the amendment of G. L. (Ter. Ed.) c. 21, made by St. 1939, c. 49. Section 8C was further amended in 1941 by chapter 598 of that year, section 6, so that it now reads as follows:

"There shall be in the division a bureau of law enforcement, under the charge of a chief coastal warden. All coastal wardens, deputy coastal wardens and fish inspectors appointed under section eight B shall be assigned to duty in said bureau. The director shall, subject to the provisions of section three, enforce chapter one hundred and thirty and all other provisions of law relative to marine fish and fisheries and in the enforcement of such laws may act through said bureau. The director, subject to the provisions of section three, shall have general supervision of all such inspectors and wardens."

The power vested in the director by said section 8C, as thus amended, is subject to the general supervisory and administrative authority of the Commissioner, but the immediate charge of the enforcement of the statutes specifically set forth in section 8C devolves on the Director. The Commissioner has authority under said section 3 to direct "inspections and investigations" but, with this exception, the power of initiating action in respect to the enforcement of the laws relating to marine fish and fisheries mentioned in said section 8C is in the Director.

The general administrative, supervisory and enforcing powers given to the Commissioner in said sections 1 and 3 which stem from former statutes and were set forth in their present form by amendment of said chapter 21 in St. 1939, c. 491, were, to the extent already indicated, curtailed by the sweep of new powers vested in the Director of Marine Fisheries by the amendment of said chapter 21 by St. 1941, c. 598, § 6.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Department of Public Works — Rate of Wages for Employees on Federal-Aided Projects.

Nov. 12, 1946.

Hon. Joseph F. Cairnes, *Commissioner of Public Works.*

Dear Sir: — In a recent letter you have asked my opinion as to whether regular employees in your department in the labor service of the Commonwealth working on a particular type of work included within Federal-aided projects, the appropriation for which appears in the general appropriation bill (St. 1946, c. 309), are to be paid the regular wage rate established for their respective positions by the Division of Personnel and Standardization, or whether they should be paid not less than the rates of wages determined by the Commissioner of Labor and Industries for such positions on such a project under G. L. (Ter. Ed.) c. 149, §§ 26 and 27.

The particular rates of wages to be paid to mechanics, teamsters, chauffeurs and laborers under said section 26 as established by said Commissioner under section 27 are to apply to the regular employees of the Commonwealth only, according to the terms of said section 26, when:

"such employees are employed in the construction, addition to or alteration of said works (i.e., public works) for which *special appropriations* are provided."

It becomes necessary, therefore, in order to give an answer to your question, to determine whether the appropriation for Federal-aided projects on which the work in question is performed is a special appropriation within the meaning of "special appropriations" as used in the above-quoted portion of section 26. This appropriation, you inform me, is item 2900–10 and appears in the general appropriation bill, said St. 1946, c. 309. It reads:

"2900–10	For projects for the construction and reconstruction of highways and bridges, including the elimination of grade crossings, which have been approved by the proper federal authorities to be included in federal aid programs, and for land damages in connection with such projects; to be in addition to amounts heretofore authorized for these purposes	$10,000,000 00"

This item appears with others under the headings:

"The Following Appropriations are made from the Highway Fund:

Service of the Department of Public Works

Public Works Building"

Special appropriations may be and are included in general appropriation bills (St. 1946, c. 309, § 3). Certain items in said chapter 309 are printed with the word "special" preceding them, but not the item under consideration. The Highway Fund, which is stated to be the source of the $10,000,000 appropriated under this item, is a part of the general fund or revenue of the Commonwealth in the treasury. *Opinion of the Justices*, 300 Mass. 630, 638–9.

In whatever manner the words "special appropriation" may be construed in the context of other statutes, I am of the opinion that as employed in the phrase "works for which special appropriations are pro-

vided" in said chapter 149, section 26, they were intended by the Legislature to mean an appropriation of public moneys to a specific, narrow and particular purpose.

Accordingly, I am of the opinion that as employed in said section 26 the words "special appropriation" do not apply to the appropriation of $10,000,000 under said item 2900–10, which is for general construction and maintenance purposes in a wide field without reference to specific or particular purposes therein.

Consequently, from the foregoing considerations I am of the opinion that the regular employees to whom you refer are not to be paid according to or with reference to the wage scale prepared by the Commissioner of Labor and Industries for the work under consideration but are to be paid the regular wage rate established for their respective positions by the Division of Personnel and Standardization.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Counties — Lease of Court Houses to Veterans Administration.

Nov. 12, 1946.

Your Excellency MAURICE J. TOBIN, *Governor of the Commonwealth.*

SIR: — Your Excellency in a recent letter has asked my opinion as to whether county commissioners are authorized to lease parts of county court houses to the Veterans Administration.

No specific provision of any statute authorizes county commissioners to lease parts of court houses, nor does such authority arise by implication from any general statutory provision.

No such authority is vested in the county commissioners of Middlesex with reference to the Waltham Court House, to which you refer in your letter, by St. 1938, c. 156, which specifically empowered such commissioners to take land by eminent domain or purchase to erect a building for the use of a district court and to furnish and equip the same, borrowing by bonds or notes the money necessary for such purpose.

Authority to lease portions of a court house cannot reasonably be said to have been granted county commissioners by the provisions of G. L. (Ter. Ed.) c. 34, § 14:

". . . They shall have authority to represent their county, and to have the care of its property and the management of its business and affairs in cases where not otherwise expressly provided; to sell and convey any real estate of the county by deed, . . ."

The power vested in county commissioners to "provide for erecting and repairing court houses" (said section 14) is not a grant of power to lease portions of such buildings.

It is a general principle of law that realty acquired for a particular public use cannot be diverted to another use without express legislative authority.

If it be deemed necessary that leases such as are described in your letter should be made, specific authorization of county commissioners to make the same should be sought from the Legislature.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Registration in Medicine — "New Student" — St. 1946, c. 364.

Nov. 12, 1946.

Mrs. Mae Manning, *Director of Registration.*

Dear Madam: — I am in receipt from you of a request for an opinion upon the question of law contained in the following letter sent you by the Secretary of the Board of Registration in Medicine:

"Will you kindly request an opinion from the office of the Attorney General in regard to the meaning of 'new students' in St. 1946, c. 364, § 4.

"Does this mean that a person who attended another medical school prior to January 1, 1941 (St. 1938, c. 259), would be considered a 'new student' at the College of Physicians and Surgeons, Boston, or would he be eligible to write our examination if he matriculated at the College of Physicians and Surgeons after August 22, 1946, to finish his medical education?"

St. 1946, c. 364, provides for the dissolution of the College of Physicians and Surgeons, a Massachusetts corporation. Sections 4 and 5 provide:

"Section 4. Said corporation shall not register any new students.

"Section 5. Section four of this act shall take effect when this act has the force of a law and the balance of this act shall take effect on June thirtieth, nineteen hundred and forty-nine."

I am of the opinion that the words "new students," as used by the Legislature in said section 4, mean students who are new to the College of Physicians and Surgeons, so that it was the legislative intent that students who have previously matriculated at other institutions are not to be registered at said college after June 22, 1946.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Industrial Accident Board — Compensation of a Guardian — Payment by Insurer.

Nov. 14, 1946.

Industrial Accident Board.

Gentlemen: — I am in receipt of your letter of November 8, 1946, relative to your authority to make a payment to a guardian of a dependent under the applicable provisions of G. L. (Ter. Ed.) c. 152, § 39, which you quote in your communication.

The duty to pay reasonable compensation to a guardian whose appointment is required to comply with chapter 152 is placed upon the insurer, and the duty of approving a sum demanded as "reasonable compensation" is placed upon your board. Payment is not to be made to the guardian from the estate of the ward, and approval of the sum demanded for the services designated by section 39 would not appear to be a proper function of a probate court. (See *Silva's Case*, 305 Mass. 380.) The authority of the board in this respect is not abrogated by the provisions of sections 69A or 69B of said chapter 152, to which you refer.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Department of Public Works — Approval of Parking Meters in 1946.

Nov. 15, 1946.

Hon. Joseph F. Cairnes, *Commissioner of Public Works.*

Dear Sir: — You inform me that your commission has been asked by Mr. Murray of Milford to approve an amendment of traffic rules and orders, which amendment provides a system of parking to be used in connection with parking meters.

With relation to this request you have asked me the following questions:

"1. Whether or not this Department is correct in withholding approval of the erection of parking meters until such time as the Legislature has dealt with the matter.

"2. If the Department's position is tenable, would it be proper to refuse to approve the proposed parking revision because of its definite connection with parking meters."

I answer both your questions in the affirmative.

In 1937 the Justices of the Supreme Judicial Court rendered an opinion to the Legislature which stated "The conclusion is that within the limits of public travel the General Court may regulate parking and may do so by a fee system intended to hasten the departure of parked vehicles and to help defray the cost of installation and of supervision" (297 Mass. 559–566).

Since that opinion was rendered, the Legislature has not passed any measure authorizing cities or towns to regulate parking in the highway by a parking meter system, nor has it given specific authority to municipalities to make contracts for the installation and maintenance of parking systems.

Specific authority has been granted to towns by G. L. (Ter. Ed.) c. 40, § 4, among other things, to make contracts, "for the installation and maintenance . . . of mechanical traffic signal light systems for the control and regulation of traffic on ways within its control, including poles, wires and other necessary apparatus upon, over or under such ways . . ." I am of the opinion that the authority to make contracts for the purchase and installation of parking systems is not comprehended within the quoted phrase.

It is by no means clear that approval of a parking system as such by the Department of Public Works would be within the general provisions of G. L. (Ter. Ed.) c. 85, § 2, in the absence of further legislation, nor is it plain that the regulatory authority over vehicles given to selectmen by G. L. (Ter. Ed.) c. 40, § 22, embraces a power to make rules creating a parking system with all the requirements, regulations and penalties which such a system that includes the use of meters necessitates.

Although the matter is not without some doubt, I am of the opinion that in the absence of specific legislation or judicial pronouncement upon the subject, your department is correct in withholding approval of a proposed erection of parking meters and of so much of the amendment of traffic rules by the Selectmen of Milford, which you have exhibited to me, as deals with the erection of parking meters and the creation of a system for parking to be maintained and enforced in connection with such meters.

Very truly yours,
Clarence A. Barnes, *Attorney General.*

Department of Public Works — Transfer of Bridge Employees from Municipal Service to that of the Commonwealth.

Nov. 26, 1946.

Hon. JOHN E. HURLEY, *Chairman, State Retirement Board.*

DEAR SIR: — You have asked my opinion as to the method which must be adopted by your board in relation to certain bridge employees transferred to the Commonwealth's service by St. 1946, c. 521.

The Attorney General does not attempt to lay down methods which must be followed by State boards in the discharge of their functions.

For the guidance of your board, however, in dealing with the cases of bridge employees who were transferred from various political subdivisions into the service of the Commonwealth on July 1, 1946, by the provisions of St. 1946, c. 521, I call your attention to certain statutory provisions and to the law applicable to such employees arising from the construction of such provisions.

Said chapter 521 provided that certain bridge employees should on July 1, 1946, be transferred to the employment of the Department of Public Works "without impairment of their civil service rights, if any, or their *retirement . . . rights.*"

G. L. (Ter. Ed.) c. 32, as amended by St. 1945, c. 658, in section 3 (8) (*a*) provides:

"Any member of any contributory retirement system established under the provisions of sections one to twenty-eight inclusive, or under corresponding provisions of earlier laws or of any special law, who, while still a member and before the date any retirement allowance becomes effective for him, becomes employed in a position in any other governmental unit in which such a system is operative, shall thereupon have his membership transferred to the second system, or if a teacher as defined in section one shall retain his membership in the teachers' retirement system, and shall be entitled to all creditable service resulting from his previous employment; provided, that such position is subject to the provisions of the law pertaining to the second system or to the teachers' retirement system, as the case may be, and that he is under the maximum age for his group on the date of such new employment. Such transfer of membership, if required, shall be effectuated by transferring within ninety days after the date of commencement of his new employment the amount of the accumulated total deductions credited to his account in the annuity savings fund of the system from which he is being separated to the annuity savings fund of the second system."

Section 4 (1) (*d*) of said chapter 32 reads:

"Any person who became or becomes an employee by reason of the taking over by the commonwealth, or by the metropolitan district commission or by any district, of any institution, or of any public or quasi-public enterprise, controlled and operated by a political subdivision of the commonwealth or by a corporation, except such a person employed by the metropolitan district water supply commission who has not elected or does not elect to become a member of the state employees' retirement system, shall be credited with such service as would have been creditable service had it been rendered by him under the provisions of sections one to twenty-eight inclusive, or under corresponding provisions of earlier laws."

Section 3 (2) (a) (*iii*) of said chapter 32 reads:

"(*a*) Membership in a system . . . shall comprise the following persons: —

. . . . . .

"(*iii*) Any person who hereafter resigns, transfers or is promoted from a position in the service under which he had inchoate rights to a non-contributory pension under this chapter or under corresponding provisions of earlier laws or of any other general or special law, to accept a position subject to the provisions of sections one to twenty-eight inclusive, if at the time of such resignation, transfer or promotion he is under the maximum age for the group in which he would be classified."

In my opinion it follows from the foregoing statutory provisions, read together so as to form an harmonious whole, that:

(1) A bridge employee taken into the Commonwealth's service on July 1, 1946, by force of St. 1946, c. 521, must, if he has previously been a member of a contributory retirement system, be taken into the State Retirement System by virtue of said section 3 (8) (*a*) with full creditable service. When such employee comes to retire, his pension will be payable as to creditable service prior to July 1, 1946, the date of transfer, by the system to which he formerly belonged and the balance by the State Retirement System. Said chapter 521 does not specifically or by implication make any special provision as to the mode in which the pension is to be paid on retirement; consequently such payment is, as I have indicated, to be governed by the provisions relative to transfers from system to system, which I have outlined, set forth in section 3 (8) (*c*).

(2) A bridge employee taken into the Commonwealth's service on July 1, 1946, by force of St. 1946, c. 521, who had inchoate rights to a non-contributory pension only and who is under the maximum age for membership in the State Retirement System, must become a member of such system by force of said section 3 (2) (*a*) (*iii*) and is to be given full prior service credit under section 4 (1) (*d*), and if he has any other inchoate rights they are preserved. Upon his retirement, his retirement allowance is to be paid by the State Retirement System. If such an employee is over such maximum age for membership in the State Retirement System, he is unaffected by any provisions of the State contributory retirement law and your board has no jurisdiction with relation to him, but he still retains any inchoate rights which he may have had to any pension under other laws.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement System — Payments for Employee on Military Leave of Absence — Step-rate Increments.

Nov. 26, 1946.

State Board of Retirement.

GENTLEMEN: — I am in receipt of your letter of November 7, 1946.

When an employee of the Commonwealth who has been on leave of absence in the military or naval forces of the United States returns to the service of the Commonwealth he is entitled to a salary rate which includes accrued step-rate increments to which he would have been eligible except

for his absence in such forces, although the increased salary is not payable until his return. (St. 1941, c. 708, § 24.)

Such increments would have been paid to him as they arose had his service for the Commonwealth not been interrupted, and he would have been paying a contribution to the retirement fund based on his salary as so increased if he had been here.

Unless the Commonwealth at the time of the employee's reinstatement pays into the annuity savings fund of the retirement system the amount which the employee would have paid had he been here, based upon his salary plus such step-rate increases as he would have received if he had not been absent, the employee, as compared with the employee who stayed at home and paid contributions on the said basis, will be prejudiced by his service with the military or naval forces of the United States. It is apparent from the whole context of said chapter 708 that it was not the intent of the Legislature that its provisions should be so construed as to create such a prejudice.

Consequently, under the terms of section 9 of said chapter 708 to which, as well as to those of section 24, you refer in your letter, there should be paid for such an employee into the annuity savings fund the amount which such employee would have paid upon his salary as increased by step-rate increments if his service with the Commonwealth had not been interrupted.

It is true that such an employee does not receive such salary increases until his return. Nevertheless, his rights with relation to contributions to the retirement system under said section 9 are not based upon his actual receipt of salary, original or increased. His contributions are to be paid for him into the system in such an amount as he would have paid if his service to the Commonwealth had not been interrupted by his military or naval service, and, as I have indicated, these are to be computed on the basis of original salary plus applicable step-rate increments.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Registration in Medicine — Use of Degrees of Practitioners in Medicine and Osteopathy.

DEC. 6, 1946.

Mrs. MAE MANNING, *Director of Registration.*

DEAR MADAM: — I am in receipt through you of the following letter requesting my opinion by the Board of Registration in Medicine:

"A graduate of an osteopathic school registered by this Board as such and holding only the D.O. degree at the time of registration, obtains an M.D. degree afterwards.

"May he then drop the letters 'D.O.' following his name and use only the letters 'M.D.' or must he use both 'D.O.' and 'M.D.' because he was registered by this Board as a D.O.?"

It would appear from the language employed by the Supreme Judicial Court in its opinion in *Sachs* v. *Board of Registration in Medicine*, 300 Mass. 426, 430, 432, that the words "practice of medicine" as employed in G. L. (Ter. Ed.) c. 112 include the practice of osteopathy. This is in contradistinction to the practice of optometry, which is not embraced

within the phrase "practice of medicine" as used in said chapter 112, a difference pointed out in the said opinion (see G. L. (Ter. Ed.) c. 112, § 10).

I am of the opinion that a doctor of medicine entitled to the degree, even if registered with the said board as an osteopathic practitioner, may use the letters "M.D." either with or without the letters "D.O."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Approval by Board of Collegiate Authority — Procedure.

DEC. 9, 1946.

Hon. JOHN J. DESMOND, JR., *Chairman, Board of Collegiate Authority.*

DEAR SIR: — You have laid before me an advertisement of a hearing held by you upon the question of your approval or disapproval of articles of organization of the College of St. Joseph, transmitted to you by the Commissioner of Corporations and Taxation under the provisions of G. L. (Ter. Ed.) c. 69, § 30, as amended, and have asked my opinion upon the following questions:

"1. Whether or not the form which has been used to advertise a petition is correct, or does it have to include the hour and the signature of the Board?

"2. If the form which has been used since the establishment of the Board is incorrect, does it invalidate the action of the Board in all previous cases if the petition was advertised as directed by the Board, a public hearing held at which there were no protests, and the petition approved or disapproved and returned to the Commissioner of Corporations and Taxation?

"3. If a petition is filed through the usual channels and the Board, after the public hearing and investigation, feels that the petition should be restricted or expanded, does the Board have the authority to so indicate to the Commissioner of Corporations and Taxation, or does the institution have to file another petition and readvertise according to the provisions of the law?"

In your letter you repeatedly refer to a "petition" which is before you. I assume that by the word "petition" you refer to "articles of organization," as the statute makes no provision for any "petition" addressed to your board or to any other officials.

1. In answer to your first question, let me say that the form of notice which you have shown me as that which was published with relation to the hearing concerning the said College of St. Joseph should properly have contained a reference to the hour at which the hearing was to be held and should have been signed at least by the chairman or secretary of the board. Moreover, it may be doubted if the notice correctly states the purpose of the hearing. It should state: "The hearing is for the purpose of determining whether the board will approve under the provisions of G. L. (Ter. Ed.) c. 69, § 30, as amended, the following articles of organization of The College of St. Joseph, to wit:"

2. In relation to your second question, it does not appear that action of the board in the past has been questioned and nothing is now before you requiring any action on your part. Even if some inaccuracies or

omissions have occurred in previous notices, it would not follow that the action of the board based thereon, under various circumstances surrounding different hearings, was necessarily void.

3. I answer your third question to the effect that the board's authority with respect to articles of organization or proposed amendments of charters submitted to them by the Commissioner of Corporations and Taxation is limited by the terms of said section 30 to approving or disapproving such articles or amendments.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Department of Public Utilities — Certificates to Steamships or Other Vessels for Carriage of Passengers or Property over Navigable Waters — Scope of Authority.

DEC. 12, 1946.

Commissioners of the Department of Public Utilities.

GENTLEMEN: — You have through your chairman asked my opinion upon the following question:

"Does the Department of Public Utilities have jurisdiction to grant or deny certificates of public convenience and necessity to steamships or other vessels for the carriage of persons or property for hire over Massachusetts navigable waters?"

I answer your question in the negative.

While it is true that under the provisions of G. L. (Ter. Ed.) c. 159, § 12, as amended by St. 1945, c. 175, "ships or vessels in excess of one hundred gross tons using steam or Diesel engine as means of propulsion . . ." have been classified by the Legislature as common carriers when used for transportation of persons or property and made subject to the jurisdiction and control of the Department of Public Utilities, the Legislature has not, as you have yourself pointed out in your letter, made provision for "certificates of public convenience and necessity" to be issued by your commission and to be essential to operation of such ships or vessels.

When the Legislature has deemed it wise to require such certificates as prerequisites to the carrying on of the functions of common carriers, it has set forth such requirement specifically and plainly with relation to some particular type of common carrier. (See with relation to: railroads, G. L. (Ter. Ed.) c. 160, § 17; street railways, G. L. (Ter. Ed.) c. 161, §§ 39, 40; electric railroads, G. L. (Ter. Ed.) c. 162, § 7; motor vehicle carriers, G. L. (Ter. Ed.) c. 159A, § 7.)

No such authorization for the issue of or requirement for the possession of such certificates arises from the provisions of said chapter 159 by implication from the inclusion of the designated type of ships or vessels within the category of common carriers subject to the jurisdiction and control of your department.

General provisions of said chapter 159 such as are contained in sections 14 and 16, concerning control of common carriers generally and applicable in their nature to such ships or vessels, govern those furnishing service by means of such ships or vessels. (Opinion of Attorney General to the Department of Public Utilities, February 16, 1939; 1939 Op. Atty. Gen. 37.)

If it is desired that the operation of such ships or vessels be prohibited except upon the issuance of "certificates of public convenience and necessity" to their respective owners, resort should be had to the Legislature for the enactment of appropriate provisions to that effect.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veterans' Benefits — Duty of Children to Support Parents — Veterans' Dependents.

DEC. 13, 1946.

Hon. FRANCIS X. COTTER, *Commissioner of Veterans Services.*

DEAR SIR: — In reply to your letter of December 12, 1946, let me say that it was held in an opinion of one of my predecessors in office (IV Op. Atty. Gen. 613, 615), in which I concur, that it was clearly evident from the context of St. 1915, c. 163, § 1, from which the present statute G. L. (Ter. Ed.) c. 273, § 20, derives, read in connection with the provisions of R. L. c. 79, §§ 18 and 19, relative to benefits for parents of veterans, similar in purpose to those of G. L. (Ter. Ed.) c. 115, as amended by St. 1946, c. 584, that "this Commonwealth did not intend that its veteran soldiers or their dependents should be compelled to resort to its courts before becoming eligible to secure the aid which the Commonwealth is in duty bound to furnish," so that the soldier or his dependents have an independent status or right to receive relief irrespective of the performance of the statutory duty of children to support them.

I am of the opinion that the parents of a veteran are entitled under the terms of the present statute (G. L. (Ter. Ed.) c. 115, as amended by St. 1946, c. 584) to the benefits designed by its terms irrespective of the provisions of G. L. (Ter. Ed.) c. 273, § 20.

It is to be noted, however, that a single exception to the general principle of law which I have pointed out is set forth in the present Veterans' Benefits statute (said chapter 115, as amended) itself, for in section 5 of said chapter 115, as amended by St. 1946, c. 584, it is provided:

"No veterans' benefits shall be paid to or for any . . . dependent of a living veteran whom said veteran *wilfully* refuses and neglects to support . . ."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

State Racing Commission — Rules — Misapplication of Regulations — Payment by Licensees.

DEC. 18, 1946.

State Racing Commission.

GENTLEMEN: — By a recent letter you have in effect asked my opinion as to the authority of your commission to enforce the provisions of Rule 162 of its Dog Racing Rules in relation to a race where the payment of certain sums, which your commission has deemed "under payments," to the public resulted not from any "errors or mechanical mishaps of totalizator machines" but from what were, upon the facts as you have stated them to

me in a brief submitted by you with your letter, errors of the presiding judge at the race in misinterpreting and misapplying Rules 13 or 33 of said rules.

Said Rule 162 in the book of Dog Racing Rules of your commission which you have laid before me, reads:

"Each licensee shall pay to the Commission on the day following each day of a dog racing meeting all monies accruing from under payments to the public in the mutuels, by reason of errors or mechanical mishaps of totalizator machines."

Under the recognized principles of law for the construction of statutes and rules the word "errors" as appearing in Rule 162 refers, as do the words "mechanical mishaps," to the incorrect or inaccurate functioning "of totalizator machines" and not to errors of persons in the performance of their duties. The meaning of a word used in a statute or rule is ordinarily to be construed in connection with the other words with which it is associated in a particular phrase. The context and phraseology of the rule as a whole do not indicate an intent that the character of the word "errors" should not be submerged by association with the words that follow it or that the word "or" as employed therein should have a disjunctive meaning. *Central Trust Co.* v. *Howard*, 275 Mass. 153, 158.

In view of the foregoing, irrespective of any other considerations, I answer the first specific question in your letter in the negative. This question reads:

"Does the Commission have the legal right to collect the sum of $7,839.13 from the Revere Racing Association, Inc. for violation of the Rules of Dog Racing adopted by the Commission."

In view of my answer to your first question, no answer is required to the second.

As to your third question, it appears from the papers which you have submitted to me that there is no dispute as to your right to collect $759.87 for commission plus $12.86 for breakage (see stenographic record of hearing returned herewith, page 4). I am not aware of any right which you have to collect any other sums.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Governor — Scope of Authority with Regard to Fares on the Boston Elevated Railway.

DEC. 26, 1946.

His Excellency MAURICE J. TOBIN, *Governor of the Commonwealth.*

SIR: — I am in receipt from you of the following letter:

"The Public Trustees of the Boston Elevated Railway have decided to discontinue the five-cent charge for local rides on surface lines. This change became effective on Saturday, December 14, 1946.

"I request your opinion as to whether I have the power under any provision of law to overrule this decision of the Public Trustees and restore the five-cent charge which the Trustees have elected to discontinue."

I am not aware of any provision of law which empowers you to overrule the decision of the Public Trustees of the Boston Elevated Railway to discontinue the five-cent charge for local rides on surface lines.

It has been held in a long line of opinions by my predecessors in office that the right of the Trustees alone to regulate and fix fares and the character of the services and facilities of the railway has been fixed and established by virtue of Sp. St. 1918, c. 159. (1935 Op. Atty. Gen. 62, and opinions collected therein.)

In my opinion the extraordinary authority vested in the Governor by St. 1942 (Sp. Sess.) c. 13, and St. 1941, c. 719, does not specifically or by implication authorize him to exercise such powers as you refer to with relation to said fares, inasmuch as the authority granted to the Governor under the said statutes of 1941 and 1942 is predicated as to its exercise upon its being necessary or expedient for meeting the supreme emergency of war and the said regulation of fares cannot be said to be necessary for such purpose.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement — Correction Officer — Power to Retire — Power to Approve by Governor and Council.

DEC. 26, 1946.

His Excellency the Governor and the Honorable Council.

SIRS: — I have received through your secretary the following communication requesting my opinion on certain questions of law connected with the proposed retirement of a correction officer of the Commonwealth. The communication reads:

"The Commissioner of Correction has requested the approval of the Governor and Council of his action in retiring from active service and placing upon the Pension Roll a Correction Officer who was born May 20, 1881 and is now over 65 years of age. He was first employed in the service of the Commonwealth at the State Prison at Charlestown as an Officer on December 1, 1908 and served in that capacity until October 10, 1931 at which time he resigned. He was reinstated as a permanent Correction Officer at the State Prison on March 1, 1946 and has been employed continuously up to the present date. He has had a total of 23 years and 7 months service as an Officer at the State Prison at Charlestown.

"It is requested that such retirement be effective at the close of business on January 4, 1947.

"1. May the Governor and Council legally approve the action of the Commissioner based upon the above facts?

"2. Does the present Council have the power to approve a retirement effective on January 4, 1947?"

The applicable provisions of G. L. (Ter. Ed.) c. 32, § 46, under which I assume the retirement is made, presumably for superannuation, read:

"The commissioner of correction may, with the approval of the governor and council, retire from active service and place upon a pension roll any officer of the state prison, the state prison colony, the Massachusetts reformatory, the state farm, the reformatory for women or any jail or house of correction, or any person employed to instruct the prisoners in any prison or reformatory, as provided in section fifty-two of chapter one hundred and twenty-seven, or any other employee of the state prison or the Massachusetts reformatory, who has attained the age of sixty-five and

who has been employed in prison service in the commonwealth, with a good record, for not less than twenty years; . . ."

1. The precise status of the correction officer to whom you refer is not made plain in your communication.

If the officer, who originally entered the service in 1908, elected after the passage of St. 1911, c. 532, not to become a member of the retirement system established by that statute, his retirement rights and limitations are those now set forth in G. L. (Ter. Ed.) c. 32, § 46, and these do not require that he leave the service on attaining a particular age. Accordingly, although already past the age of sixty-five, he would be still in the active service of the Commonwealth. Opinion of Attorney General to Commissioner of Public Health, May 27, 1946.

If, however, the officer became a member of the retirement system under St. 1911, c. 532, he would now, after his re-entry into the service as a member, be governed by St. 1945, c. 658, § 3 (6), with relation to re-entry of members into active service, and by the provisions of said section 3 (2) (*e*) and (*f*) would be required to leave the service at the maximum age for employees of his group, which would be at sixty-five, in which case he would have ceased to be in the active service on May 11, 1946, and could not now be retired, being no longer an employee in service.

From the facts as you have stated them it would appear that the service of this officer with the Commonwealth had not been continuous. Said G. L. (Ter. Ed.) c. 32, § 46, under which retirement is sought, does not expressly mention "continuous service." Although the Supreme Judicial Court has said that under the terms of G. L. (Ter. Ed.) c. 32, § 53, with relation to the retirement of certain veterans, the requirement of "continuous service" is to be implied from the phraseology of said section 53, there has been no judicial pronouncement requiring a similar implication from the words employed in said section 46. In the absence of such a pronouncement, I am of the opinion that the "active service" referred to in said section 46 is not solely that of continuous service.

2. I answer your second question in the negative. The power to retire the official in question is vested by said section 46 in the Commissioner of Correction. It cannot, however, be exercised without the approval of the Governor and Council.

Under the terms of the request, which you state was made by the Commissioner, the actual act of retirement of the officer in question by virtue of the authority vested in the Commissioner will be effectuated on January 4, 1947. Such act of retirement requires the approval of the Governor and Council having authority at the time when the act is effective, January 4, 1947. The present incumbents of the offices of Governor and members of the Council will not be in office on January 4, 1947. It follows that the present Governor and Councillors cannot give a valid approval of such retirement which is to be effectuated after their respective terms of office have terminated.

It has been said in an opinion of one of my predecessors in office, in which I concur, that an executive council had no power to revise the action of a former council in giving approval to an appointment (IV Op. Atty. Gen. 381, 383). It would follow from the reasoning of such an opinion that an executive council has no power to give its approval to a retirement which is to take place after it has gone out of office.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Armory — Non-military Use — Local Committee of a Political or Municipal Party.

DEC. 27, 1946.

Brig. Gen. VINCENT H. JACOBS, *Adjutant General's Office.*

DEAR SIR: — I am in receipt from you of the following letter:

"1. Your opinion is respectfully requested as to whether or not the inclosed request of the Democratic Club of Massachusetts for rental of an armory, as per paragraph 2, their letter of December 18, 1946, may be authorized under the provisions of G. L. c. 33, § 41 (*c*), as amended by St. 1939, c. 425, which permits the temporary use of armories for certain specified 'public purposes' for this particular application, as follows:

"a. 'A meeting or rally of a particular party or a municipal party, as defined by section one of chapter fifty, conducted by the duly constituted local committee of such party; provided that no party shall be permitted the use of the same armory more than twice in the same year,' i.e., whether this organization is a 'political party or a municipal party' as set forth in said section 41."

The request of the Democratic Club of Massachusetts, to which you refer and which you have annexed to your letter, reads:

"Adj. Gen. WILLIAM H. HARRISON, JR., *State House, Boston, Mass.*

"DEAR SIR: — Application is hereby made for the use of the East Armory on East Newton St., Boston for the evenings of Tuesday, December 31, 1946 and Monday, March 17, 1947, by the Democratic Club of Massachusetts a duly organized political group under the statutes of Massachusetts.

"The purpose is to use the armory on these nights for political meetings with a banquet, speeches and the usual entertainment that goes with political gatherings.

"Application is made for this permission under the provisions of Chapter 33, Section 41, subsection C of our General Laws.

Respectfully submitted,
DEMOCRATIC CLUB OF MASSACHUSETTS.

By (Signed) CHARLES H. MCGLUE,
President.
11 Beacon Street, Boston, Mass.,
Room 304."

G. L. (Ter. Ed.) c. 33, § 41 (*c*), par. 8, which you have set forth in your letter, limits the use of armories for the public purpose of "a meeting or rally of a political party or a municipal party, as defined by section one of chapter fifty" to those which are "*conducted by the duly constituted local committee of such party.*"

It does not appear from any information which you have laid before me that the "Democratic Club of Massachusetts" is *the duly constituted local committee* of the Democratic party or of a municipal party. Indeed such club is described in its request merely as "a duly organized *political group* under the statutes of Massachusetts."

The words "duly organized local committee" as used in said section 41 are, in my opinion, employed by the Legislature as meaning a "ward,"

"town" or "city" committee, respectively, described in and organized under G. L. (Ter. Ed.) c. 52, as amended.

This being so, it follows that the request to which you refer may not lawfully be granted under the provisions of the applicable statutes.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

State Racing Commission — Fair Employment Practices Commission Rules — Conflict of Authorities — G. L. (Ter. Ed.) c. 128A, § 10.

DEC. 30, 1946.

State Racing Commission.

GENTLEMEN: — In a recent letter you have asked my opinion whether a rule of your commission made to render effective section 10 of chapter 128A of the General Laws, as amended, and a form prescribed by your commission under such rule are in conflict with the rules of the Fair Employment Practices Commission.

Said section 10 in its applicable part reads:

". . . At least eighty-five per cent of the persons employed by a licensee at a racing meeting held or conducted by him shall be citizens of the commonwealth and shall have been such citizens for at least two years immediately prior to such employment."

The rule which you have made with relation thereto reads:

"The Commission shall require each Association to obtain from every person employed by them a sworn statement, on a form prescribed by the Commission, setting forth information regarding citizenship, place or places of residence during the past two years and answers to any other questions the Commission may prescribe."

The form prescribed by the rule, which is to be filled in by employees of licensees, contains, among others, a statement as to the employee's place of birth, of his status as a citizen of the United States, and, if he is a citizen by naturalization, a statement of such fact with the date thereof, the number of his certificate and the place of its issue, and also a statement as to length of residence in the Commonwealth and the place or places of such residence.

The applicable statute in said section 10 requires that eighty-five per cent of the employees of a licensee shall be citizens of the Commonwealth for at least two years before employment.

A person who is a citizen of the United States by birth or naturalization and a resident of a particular State is necessarily a citizen of that State (U. S. Const., 14th Amend.; *Boyd* v. *Thayer*, 143 U. S. 135, 161). An inquiry as to the naturalization or place of birth of an employee may, therefore, be material to a determination as to his citizenship in the Commonwealth and as to the length of such citizenship prior to employment. Accordingly, it would appear that the requirement of statements from a prospective employee as to naturalization, such as appear under the said rule upon the prescribed form, is impliedly authorized by the provisions of said section 10.

Since the requiring of such statements is so authorized by statute, it cannot be abrogated or prohibited by any rule of the Fair Employment

Practices Commission nor can it be properly deemed to be evidence of discrimination against an employee on the part of an employing licensee subject to the provisions of said chapter 128A by force of any ruling or statement of policy made by such commission.

In my opinion no changes in the said rule are required to be made by your commission.

I have communicated the views which I have expressed herein to the Fair Employment Practices Commission and I am advised by them that they will not treat the inquiries as to naturalization or place of birth on the said form prescribed by you as evidence of unlawful discrimination on the part of a licensee.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — Lowell Textile Institute — Building Association — St. 1946, c. 428.

JAN. 8, 1947.

Board of Trustees of Lowell Textile Institute.

GENTLEMEN: — I am in receipt from you of a letter asking my opinion on four questions relating to St. 1946, c. 428, entitled, "An Act incorporating the Lowell Textile Institute Building Association for the purpose of providing additional dormitory and other facilities for said Institute."

Chapter 428 creates a non-profit making corporation for the purpose of "constructing, equipping and maintaining buildings for dormitories, commons and other uses connected with the Lowell Textile Institute."

It empowers such corporation:

1. To hold for such purposes real and personal estate not exceeding $500,000.
2. To fill vacancies in the membership of the corporation as originally specified in the act in a prescribed mode.
3. To appoint officers in a prescribed mode and to fix their duties and to make by-laws.
4. To lease *from* the trustees of Lowell Textile Institute, they acting on behalf of the Commonwealth, subject to the approval of the Governor and Council, land for the erection and maintenance of dormitories and other buildings for the use of the Institute or its students.
5. To lease *to* the said trustees, they acting on behalf of the Commonwealth, any real estate or buildings *owned* by the corporation for any use of the Institute.
6. To borrow money and issue bonds.
7. To pledge as security for the payment of such bonds rentals receivable under any lease made by the corporation *to* the trustees of Lowell Textile Institute.

The act further authorizes the trustees of the Institute *to make* leases to the corporation of land for the erection of buildings for the use of the Institute or its students.

The act further authorizes the trustees on behalf of the Commonwealth *to take* leases of any real estate or buildings which are owned by the corporation, and provides that any building so leased to the trustees by the corporation shall become the property of the Commonwealth upon pay-

ment in full of all obligations which the corporation may have incurred with relation to a building so leased to the trustees.

The act designates the members of the corporation and names the incorporators, who also constitute the board of directors, and authorizes remaining members and directors to fill vacancies in their number. But the act does not make any public officer as such an incorporator, nor does it provide that successor members shall be such officers.

Although the corporation is by the terms of the statute a non-profit making organization and although the activities which it is authorized to carry on are for the promotion of a public purpose, namely, education, the corporation itself is plainly not under public management nor by any reasonable interpretation of the statute can it be said to be anything other than a private corporation.

Your four questions are:

1. Would the aforesaid lease from the corporation to the Commonwealth be a binding obligation on the Commonwealth whether or not the General Court appropriated sufficient funds to pay the rent?

2. Does the act violate section 11 of Article LXII of the Amendments to the Constitution of Massachusetts by authorizing any transaction which constitutes a giving or lending of the Commonwealth's credit to or in aid of a private association or a corporation privately owned and managed?

3. Does the act violate section 3 of said Article LXII in that the bonds issued by the corporation constitute a borrowing of money by the Commonwealth not authorized by the General Court in accordance with the procedure specified in said section 3?

4. Provided the bonds issued by the corporation are secured by a pledge of rentals sufficient to make them legal investments for savings banks under the terms of the act, can any one savings bank in this Commonwealth legally acquire the entire issue of the bonds?

1. I answer your first question in the affirmative. The lease of a building by the corporation to the trustees under the fifth power described above will create a binding obligation upon the Commonwealth to pay through the trustees, or directly, the amount of rent agreed upon for the rental of such a building. The failure of the Legislature in any given year to appropriate money for such payment, while causing some temporary embarrassment to the lessor, would not discharge the said obligation nor nullify the lease. The rental due might be recovered by the lessor through the courts under the provisions of G. L. (Ter. Ed.) c. 258.

2. I answer your second question in the negative. Article LXII of the Amendments to the Constitution is, in part, as follows:

"Section 1. The credit of the commonwealth shall not in any manner be given or loaned to or in aid of any individual, or of any private association, or of any corporation which is privately owned and managed. . . ."

It is plain that this corporation is privately owned and managed. The incorporators named by the Legislature are not public officers nor is there provision that their successors shall be such. No power of management is vested in any public officer.

Authority is granted by said chapter 428 to the corporation to borrow money and to issue bonds therefor, and specific authority is given to the corporation to pledge as security for the payment of the bonds the rentals

due the corporation from the Commonwealth referred to in my answer to your first question.

The only obligations which the statute authorizes the Commonwealth to incur are obligations to pay rent for property it rents for the use of the Lowell Textile Institute or its students. Rentals are by their nature assignable. The statute merely provides that they shall be assignable for a particular purpose. No contract of suretyship or guarantee of the corporation's obligations is contemplated. The Commonwealth's obligation under no circumstances goes beyond its obligation to pay rent. In my opinion this does not constitute giving or loaning the credit of the Commonwealth in aid of the corporation. Certainly there is nothing in the Debates in the Constitutional Convention upon this amendment which indicates that sponsors of the amendment intended to prohibit such a transaction. (See Debates in the Constitutional Convention 1917–1918, Vol. III, pp. 1217–1234.)

In other States similar plans have been held not to come within the inhibition of similar constitutional provisions. *Baker* v. *Carter*, 165 Okla. 116, 25 P. (2d) 747; *Loomis* v. *Callahan*, 196 Wis. 518, 220 N.W. 816; *McLain* v. *Regents of the University*, 124 Ore. 629, 265 Pac. 412.

3. I answer your third question in the negative. The bonds to be issued under said chapter 428 by the corporation are clearly not themselves in any sense bonds or obligations of the Commonwealth. Obligations of the maker of a bond are not pledged as security for the payment of further obligations of its own. The issue and sale of such bonds are not a borrowing of money by the Commonwealth but by the corporation

The principles of law which I have hereinbefore set forth were expressed by one of my predecessors in office in an opinion, with which I concur, dated January 12, 1940, to the Trustees of the Massachusetts State College with relation to a statute similar to said St. 1946, c. 428, namely, St. 1939, c. 388.

4. I answer your fourth question in the affirmative. Said chapter 428 provides that said bonds, when secured by a pledge of rentals sufficient in amount to meet the principal and interest of the said bonds, shall be legal investments for savings banks and domestic life insurance companies. Before the enactment of this statute such bonds, under existing laws, were not legal investments for savings banks or domestic life insurance companies (G. L. (Ter. Ed.) cc. 168–175).

I am of the opinion that the intent and effect of chapter 428 are to make such bonds so secured legal investments for savings banks in the Commonwealth without limitation as to the amount of such bonds which can be purchased by any one savings bank or the proportion which the amount of such bonds held by a savings bank bears to its other investments.

For the reasons given in my answers to your second and third questions, I am of the opinion that said chapter 428 is constitutional.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — Federal Funds in Grant.

JAN. 9, 1947.

VLADO A. GETTING, M.D., *Commissioner of Public Health.*

DEAR SIR: — In a recent letter you have written me as follows:

"The Department of Public Health receives grants-in-aid from the Children's Bureau and the U. S. Public Health Service of the Federal Security Agency. In the administration of these funds, which are not subject to appropriation by the State Legislature, the Department acts as an agent of the Federal Government since both the Children's Bureau and the U. S. Public Health Service require that none of these funds be expended except in accordance with their regulations and with budgets and plans presented to them in advance for their approval.

"The Department of Public Health is now about to receive, after approval from the Commission on Administration and Finance and in accordance with the Acts of the General Court, additional funds from the Children's Bureau which will be expended for the purchase of services to be rendered by a university in the development and teaching of courses in public health. From time to time such courses will be given in different universities and paid for entirely from federal grants derived from either the Children's Bureau or the U. S. Public Health Service."

You have also informed me that no money of the Commonwealth itself is at any time to be used in making the payments referred to but that the Commonwealth, through you, will disburse sums which have been received from the agencies of the Federal Government which you have mentioned.

You have asked my opinion as to whether "the purchase" from universities of the services which you have referred to is in opposition to the laws or Constitution of the Commonwealth.

The expenditures to which you refer are not forbidden by any law of the Commonwealth.

They are not prohibited by Article XLVI of the Amendments to the Constitution of Massachusetts, commonly called the Anti-aid Amendment, nor by any other provision of the Constitution.

The principles of law leading to the foregoing conclusions were laid down in an opinion by one of my predecessors in office, with which I concur (1942–1944 Op. Atty. Gen. 74).

It was said in that opinion with respect to the prohibition of Article XLVI upon the use of "public money" for the purpose of "founding, maintaining or aiding . . . any college, infirmary, hospital, institution, or educational, charitable or religious undertaking" that the words "public money," as well as the words "moneys" and "money," as employed in the amendment, mean money belonging to the Commonwealth or one of its political subdivisions and do not comprehend money or funds which are those of the United States, and that under a plan similar to the one you have described in your letter the money received by the Commonwealth is at all times the money of the United States and not of the Commonwealth. It was further said that under such a plan a State department in expending money so received from the Federal Government acts merely as an agent of the United States in expending on behalf of

the Federal Government for the purposes designated by the latter "money which at all times, when represented by checks or when received by negotiation of the checks, is that of the United States and not that of the Commonwealth."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Teachers' Retirement Association — Public Schools — Persons Employed in Care of Children of Pre-school Age.

JAN. 9, 1947.

Hon. JOHN J. DESMOND, Jr., *Commissioner of Education.*

DEAR SIR: — You have asked my opinion upon two questions of law which are as follows:

"(1) Shall persons employed under the provisions of St. 1946, c. 165 be eligible to membership in the Teachers' Retirement Association; and

"(2) Shall such persons be considered as 'teachers' entitled to all the rights and privileges of public day school teachers in the employ of the same school system?"

I answer both your questions in the negative.

St. 1946, c. 165, amended G. L. (Ter. Ed.) c. 71, by inserting therein sections 26A to 26F. The act was entitled: "An Act providing for extended school services for certain children of certain employed mothers." Sections 26A and 26B read:

"SECTION 26A. If the school committee of a town determines that sufficient need exists therein for extended school services for children, between three and fourteen years of age, of mothers who are employed, and whose employment is determined by said committee to be necessary for the welfare of their families, said school committee, subject to section twenty-six B, and with the approval of the city council or selectmen may establish and maintain such services.

"SECTION 26B. If said school committee, upon determination by it of sufficient need, votes that said services should be established by it in such town upon approval of the city council or selectmen, it shall submit in writing a plan of said services to the commissioner of education for his written approval; provided, that said extended school services proposed in said plan shall consist of such care as shall be determined by standards established by said commissioner in consultation with the state department of public health and shall be operated by said school committee under the general supervision of said commissioner; and, provided further, that said school committee shall establish as one of the rules of admission of any such child to the benefits of said extended school services that the parents of such child shall pay toward the cost of said services such sum, not exceeding four dollars per week for such child, as said school committee shall determine, except that such payments in the case of children of pre-school age shall be at a weekly rate of not less than three dollars. For the purposes of clause (2) of section five of chapter forty, the establish-

ment and maintenance of said extended school services shall be deemed to be included within the term 'support of public schools.'"

The other sections provide for the acceptance of funds from the Federal Government and of contributions from private sources for the purposes of such "extended school services," for the exceeding of a town's debt limit in anticipation of such Federal funds and for reimbursement by the Commonwealth of a portion of the funds expended by a town for such "extended school services."

The word "*teacher*" is defined in the Contributory Retirement Law, G. L. (Ter. Ed.) c. 32, § 1, as amended by St. 1945, c. 658, § 1, as

"any person who is employed by one or more school committees . . . as a teacher . . . in any public school as defined in this section . . ."

The words "public school" are defined in said section 1 as

"any day school conducted in the commonwealth under the superintendence of a duly elected school committee and also any day school conducted under the provisions of sections one to thirty-seven inclusive of chapter seventy-four."

The schools provided for by said G. L. (Ter. Ed.) c. 71, §§ 26A and 26B, inserted by said St. 1946, c. 165, cannot be said to be conducted "under the superintendence of a duly elected school committee," for by the provisions of said section 26B such schools "shall be operated by said school committee *under the general supervision of said commissioner*" (the Commissioner of Education).

The first clause of the quoted definition of "public schools" is in harmony with the general principles of law relative to public schools set forth in various opinions of the Supreme Judicial Court. For example, in *Leonard* v. *School Committee of Springfield*, 241 Mass. 325, 329, the court said:

"The policy of the Commonwealth from early times has been to establish a board elected directly by the people separate from other governing boards of the several municipalities and to place the control of the *public schools* within the jurisdiction of that body unhampered as to details of administration and not subject to review by any other board or tribunal as to acts performed in good faith. . . ."

Day schools established as a part of the "extended school services" under said sections 26A and 26B do not appear to be a part of the general public school system of day schools provided for in G. L. (Ter. Ed.) c. 71, § 1, at which attendance is compulsory (G. L. (Ter. Ed.) c. 76, §§ 1, 2). They differ from the latter day schools in many material respects. By the provisions of said section 26B parents are required to pay stated sums for admission of children to these "extended school services." Such "services" are not described in said sections as schools and are required to give not tuition but "*such care* as shall be determined by standards established by the said commissioner." Some of the children who may be admitted are described in said section 26B as "children of *pre-school* age."

It would, therefore, appear that a "person employed" under the provisions of said sections 26A and 26B cannot be said to be "employed . . . as a *teacher*" in a public school either within the terms of the quoted definition in said chapter 32 or within the meaning of the word "teacher" as employed in G. L. (Ter. Ed.) c. 70, § 1A, with relation to reimbursement

for school salaries. Reimbursement for salaries of persons employed by a town in said "extended school services" is specifically provided for in section 26E of chapter 32 upon a basis different from that for reimbursement under said chapter 70 with relation to "teachers . . . in the public day schools."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

County — Treasurer — Commissioners — Payments for Tuberculosis Hospital.

JAN. 13, 1947.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have asked my opinion as follows:

". . . as to whether or no the county treasurer of Bristol County may make payments on account of salaries and expenses of the maintenance of said hospital on the order of the trustees of said hospital, without the signatures of the county commissioners as required in section 11 of said chapter 35."

I answer your inquiry in the negative.

G. L. (Ter. Ed.) c. 35, § 11, provides:

"No payments, except payments of expenses in criminal prosecutions, of expenses of the courts, of the compensation or salaries of elected county officers, of outstanding notes or bonds and of interest thereon, shall be made by a treasurer except upon orders drawn and signed by a majority of the county commissioners, certified by their clerk and accompanied, except in Suffolk county, by the original bills, vouchers or evidences of county indebtedness for which payment is ordered, stating in detail the items and confirming the account. Said clerk shall not certify such orders until he has recorded them in the records of the commissioners."

St. 1945, c. 398, § 1, amended G. L. (Ter. Ed.) c. 111, § 87, so that the county commissioners of Bristol are no longer trustees of the tuberculosis hospital of Bristol County and section 2, by further amendment of said chapter 111, established a new board of trustees with authority to manage such hospital and provided that "all pertinent provisions of law relative to county commissioners as trustees of such (county) hospitals shall, in the case of the hospital within the county of Bristol, apply to the trustees thereof."

It was doubtless due to a misinterpretation of the above-quoted provision of the statute that the county commissioners of Bristol have, as you inform me, signified their intention of refusing to make the necessary orders for payments in connection with the operation of said hospital.

The duty of county commissioners to make orders for the payments of county expenses, which signify their approval thereof, exists by necessary implication from the terms of said G. L. (Ter. Ed.) c. 35, § 11, which prohibit a county treasurer from making such payments without such action by the county commissioners.

This duty rests upon the county commissioners entirely, irrespective of whether they are or are not the trustees of a tuberculosis hospital.

The provisions of law imposing this duty are not "pertinent provisions of law relative to county commissioners as trustees of such (county) hospitals," as the quoted words are used in said chapter 398, section 2, and not being such "pertinent provisions," they are not made inapplicable to them nor applicable to the present trustees of the tuberculosis hospital of Bristol County with regard to the approval of payments to be made by the county treasurer for such hospital.

It follows that the county treasurer may not make payments in connection with the operation of Bristol County Tuberculosis Hospital without orders of the county commissioners for the same, and that it is the duty of the county commissioners to make such orders for proper payments on account of salaries and expenses of the maintenance of said hospital.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Veterans' Bonus — Service in the Armed Forces of the United States.

JAN. 13, 1947.

Hon. JOHN E. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — In a letter of January 8, 1947, with relation to those entitled to receive the so-called "bonus," you have requested my opinion "relative to the interpretation of the word 'served' as it appears in the fifth line in section 1 of chapter 731 of the Acts of 1945, to wit: 'To each person who shall have *served* in the armed forces of the United States.'"

This precise request was made by you in a communication to me dated May 1, 1946, and was answered by me in an opinion to you rendered on May 3, 1946.

In said opinion you were informed that by the use of the word "served" in said section 1 the Legislature intended to include within the sweep of the said section "those persons who had been inducted into or sworn into the armed forces of the United States without regard to the particular duties to which they were thereafter assigned or to the active or inactive character of the service which was required of them thereafter by the armed forces prior to their discharge."

An application of the foregoing principle, of which you were advised, to the specific cases of six applicants which you have set forth, respectively, in your letter of January 8, 1947, shows plainly that in each instance the applicant "served in the armed forces of the United States" as the quoted words are used in said section 1 of St. 1945, c. 731.

When the Legislature has intended to indicate *active duty* with the armed forces as a prerequisite to obtaining a "bonus," it has done so in explicit phraseology by the use of the words "performed *active service*" (see St. 1946, c. 581, § 1 (1), (2)).

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Armory — Non-military use — Lease.

JAN. 17, 1947.

His Excellency ROBERT F. BRADFORD, *Governor of the Commonwealth.*

SIR: — I am in receipt from Your Excellency of the following letter, accompanied by a communication from the Adjutant General to you:

"Enclosed herewith please find copy of a letter dated January 13th from the Adjutant General of Massachusetts relating to the National Guard Armory at Logan International Airport.

"I should like to have an opinion from you as to the legal rights, if any, of Northeast Airlines as to the occupation of said Armory and as to the proper steps to be taken to compel the vacation of the Armory by said Airlines.

"At the present time I do not request you to take action in accordance with the last sentence of the enclosed letter."

You have not advised me of any facts which would give to the Northeast Airlines even a color of right to occupy a State armory. No provision of law exists in the statutes which authorizes the use of an armory for private business purposes.

G. L. (Ter. Ed.) c. 33, § 38 (*b*), as amended, places the control of all armories in the Governor as Commander-in-Chief of the State Militia. Section 40 of said chapter 33 authorizes "every officer whose command occupies, or assembles or drills, in any armory, drill hall or building used according to law for that purpose" to have "control of such premises during the period of occupation, subject to orders of his superior officers," and it is provided that "any person intruding contrary to his orders or to the orders of his superior officers, or who interrupts, molests, obstructs, . . . the troops . . . so occupying such premises, may be ejected, forcibly, if necessary . . ."

The power to take order to oust the Northeast Airlines from their occupancy of an armory would appear to be vested in Your Excellency as Commander-in-Chief, through the Adjutant General, by ejecting the Airlines and would not require action on the part of the Attorney General, especially as the Adjutant General states in his communication to you that: "It will be imperative that the portion of the building occupied by them [the Northeast Airlines] be used for military purposes."

Whether the structure in question is technically an "armory" is not without doubt. The hangar for the use of the National Guard appears to have been constructed, as I am informed, in 1932 under an authorization for a sale of notes by the State Treasurer, St. 1931, c. 268, §§ 1–5, to provide for the construction of public buildings and for permanent improvements. An appropriation from the proceeds of such sale was made as follows:

"*Service of the Armory Commission.*

Item		
153b	For the construction of aviation hangars and building for administrative purposes, a sum not exceeding two hundred fifty thousand dollars	$250,000 00"

It is not necessary to decide whether the structure in question is technically an "armory," for even if such structure be not considered an

"armory," it is a public building devoted to the purposes of the military and there is no official who has authority to lease it or to permit occupancy for the purposes of a private commercial corporation.

From such investigation as I have made of the situation it does not appear that the Northeast Airlines have ever received any lease of the building or any written permit to occupy it. The officials of the Northeast Airlines claim only that former Adjutant General Keville gave them an oral permission to occupy the hangar for an unspecified period, and that they received no reply to a letter written by them to him asking for a lease or permit.

The former Adjutant General had no authority to give any permission to this private commercial corporation to occupy or make use of this public structure, and the Northeast Airlines derive no right to occupy from any such permission if ever given. It follows that if the structure is to be regarded not as an armory but as a public building, the Northeast Airlines are, nevertheless, a trespasser on the premises and their ejectment therefrom may be made under your direction by the State Police.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Civil Service — Reasons of Appointing Authority for not Selecting the First Person on an Eligible List — G. L. (Ter. Ed.) c. 31, § 15, Par. C.

JAN. 21, 1947.

Mr. THOMAS J. GREEHAN, *Director, and the Civil Service Commission.*

GENTLEMEN: — I am in receipt from the director of a letter asking my opinion relative to the action of the city marshal of Salem in giving a reason for not appointing one whose name appears highest on a certified list of persons submitted to him for promotion to the position of sergeant of police.

The director informs me that the city marshal is the "appointing officer" under the terms of the city charter, subject to the approval of the mayor; that the mayor has refused to approve a promotion proposed by the city marshal of the first person named in the certified list, and in promoting the second on such list the marshal has stated in effect that his "reason" for not promoting the one higher on the list is that the mayor refuses to approve the promotion of the latter person.

The letter asks whether, in my opinion, the "reason" given by the city marshal is a "reason" within the meaning of G. L. (Ter. Ed.) c. 31, § 15, par. C.

I am of the opinion that said "reason" so given is one covered by the word "reason" in said paragraph C of section 15, which in its applicable parts reads:

"In each instance when the appointing authority appoints or promotes, as the case may be, any person other than the person whose name appears highest on a list certified to him or it by the director for a position, the appointing authority shall forthwith deliver to the director a written statement of his or its *reason* for not appointing or promoting the person or persons whose name or names appear on such list with higher rating than the name of the person so appointed or promoted, and no appointment or

promotion of any person other than the person whose name appears highest on such list shall become effective until such statement has been received by the director. . . ."

The fact that the mayor, whose approval is necessary to the promotion of a person, refuses to give it to number one on the certified list is a reason for the promotion by the marshal of number two. To rest only upon a promotion by the marshal, of which the mayor refuses to approve, under the circumstances described, would appear to leave vacant the place to be filled. In such a case, a promotion by the marshal of the next person upon the list who is acceptable to the mayor would seem to be the only way in which the vacancy could be filled, and the mayor's non-approval of the first person furnishes a reason for the marshal's promotion of the second.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Registration in Medicine — Interne — Limited Registration.

JAN. 21, 1947.

MRS. MAE MANNING, *Director of Registration.*

DEAR MADAM: — The Board of Registration in Medicine has through you asked my opinion upon the following question:

"In order to meet the requirements of St. 1946, c. 293, must an applicant for examination, who is a non-resident, have been granted Limited Registration by this Board to cover an appointment as an interne, or is a statement from the hospital regarding his duties acceptable."

I am of the opinion that such an applicant must have been registered as an interne under the provisions of G. L. (Ter. Ed.) c. 112, § 9, as amended by St. 1945, c. 186, in order to avail himself of the privileges granted under St. 1946, c. 293, with relation to being examined for registration as a physician by the said board under G. L. (Ter. Ed.) c. 112, § 2, as amended.

The applicable portion of said St. 1946, c. 293, reads:

"Notwithstanding any contrary provision . . . all persons not residents of this commonwealth who received the degree of doctor of medicine from Middlesex University school of medicine prior to January first, nineteen hundred and forty-six and who shall have interned in a charitable or municipal hospital within the commonwealth said interneship having commenced prior to said January first, nineteen hundred and forty-six shall be eligible to be applicants for registration as qualified physicians, shall be examined for such registration by the board of registration in medicine . . ."

With relation to interneship, G. L. (Ter. Ed.) c. 112, § 9, as amended, is as follows:

"An applicant for limited registration under this section who shall furnish the board with satisfactory proof that he is twenty-one or over and of good moral character, that he has creditably completed not less than three and one half years of study in a legally chartered medical school having the power to grant degrees in medicine, and that he has been appointed an interne, fellow or medical officer in a hospital or other

institution maintained by the commonwealth, or by a county or municipality thereof, or in a hospital or clinic which is incorporated under the laws of the commonwealth or in a clinic which is affiliated with a hospital licensed by the department of public health under authority of section seventy-one of chapter one hundred and eleven, may, upon the payment of five dollars, be registered by the board as a hospital medical officer for such time as it may prescribe; but such limited registration shall entitle the said applicant to practice medicine only in the hospital or other institution designated on his certificate of limited registration, or outside such hospital or other institution for the treatment, under the supervision of one of its medical officers who is a duly registered physician, of persons accepted by it as patients, and in either case under regulations established by such hospital or other institution. Limited registration under this section may be revoked at any time by the board."

It is obvious from the phraseology of said section 9 that an interne is regarded by the Legislature as one practicing medicine, though carrying on such practice in a restricted area. In order to be entitled to practice in such manner he is required to be registered by the said board. This form of registration is called "limited registration" by the phraseology of said section 9, but it appears to be a registration to practice medicine of the same kind if not of the same extent as that provided for physicians generally by section 2 of said chapter 112 and equally necessary for lawful authorized practice of medicine within its scope.

Section 6 of said chapter 112 prohibits the practice of medicine, except as lawfully authorized, with penal provisions.

Reading said St. 1946, c. 293, and said G. L. (Ter. Ed.) c. 112, §§ 2, 6 and 9, together so as to form an harmonious whole, it seems apparent that when the Legislature referred in said chapter 293 to those "who have interned in a charitable or municipal hospital," it intended to designate those who had practiced medicine as internes in accordance with the lawful authorization provided for by said section 9 of chapter 112, and that by the word "interneship" in said chapter 293 it intended to refer to a lawfully authorized period of work as an interne practicing medicine in connection with the designated classes of hospital.

A mere statement from a director of a hospital that a doctor had acted in the capacity of an interne cannot supply the lack of lawful authorization through registration under said section 9.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement — Creditable Service — Transfer of Certain Employees to Federal Employment — Veterans.

JAN. 27, 1947.

State Board of Retirement.

GENTLEMEN: — I am in receipt of a communication from you asking my opinion as to whether you may allow creditable service to those present employees of the Commonwealth in the service of the Division of Employment Security who were transferred to the employ of the Federal Government by executive order and who, while in the employ of the Federal Government, entered on leaves of absence the armed forces of the United States. You also inquire as to whether the Commonwealth should

pay such of the contributions of said employees to the retirement system as became due while they were on such military leave from the service of the Federal Government.

St. 1943, c. 535, § 1, provided for the reinstatement in the Commonwealth's service in the Division of Employment Security of those employees who had been transferred to the United States Employment Service, with such promotional and seniority privileges and rights as they would have had if they had never left the Commonwealth's service.

Section 3 of said chapter 535 provides that any such employee when reinstated in the Commonwealth's employment service shall "be restored to full status under the contributory retirement system" and

"shall receive credit for his full service while he was a member of the federal and state retirement systems if his accumulated deductions in the state retirement system have not been withdrawn, or if he pays into the annuity savings fund . . . the full amount withdrawn by him upon the termination of his employment in the service of said division of employment security, *and in either case an additional amount equal to the payments*, with regular interest, *which he would have contributed* if he had remained a member of said state retirement system."

It follows that such an employee when reinstated in the Commonwealth's service and in the retirement system is entitled to have credited to him by the retirement system the full time that he was a member of both the State and Federal retirement systems.

There is no provision in said chapter 535, however, which provides that the Commonwealth, through the retirement system, shall pay into the system for the benefit of such an employee the amount of the contributions which he would have made to the State retirement system allocable to the period when he was in the Federal Employment Service. No other statute provides for such a payment on behalf of such an employee nor for the payment of withdrawals which he may have made.

As to the amount of the contributions which would have been due from such an employee had he remained in the Commonwealth's service and which are allocable to the period when the employee was on leave from the Federal Employment Service and in the military or naval service of the United States, provision appears to have been made for payment by the State system on behalf of the employee.

With relation to the type of employee under consideration, St. 1943, c. 535, § 1 (*e*), provides that he

"shall be entitled to all rights and privileges provided by chapter seven hundred and eight of the acts of nineteen hundred and forty-one, as amended; provided, that they would have been subject to the provisions of said chapter seven hundred and eight, as amended, had they remained in the service of the division of employment security or its successor; and provided, further, that the same or similar positions are re-established in the division of employment security or its successor or exist in some other department, board or commission of the commonwealth."

St. 1941, c. 708, as amended, in section 9 provides that a person who leaves the service of the Commonwealth to enter the military or naval forces of the United States after January 1, 1940, and serves therein shall, when reinstated or reemployed in the service of the Commonwealth, have credited to him as creditable service under any contributory system the

period of said military or naval service, and the Commonwealth shall pay into the retirement system the amount which said person would have paid had his employment with the Commonwealth not been interrupted by his military or naval service.

Reading the provisions of said St. 1941, c. 708, § 9, and of St. 1943, c. 535, § 3, together so that they will be harmonious, it appears that the Commonwealth is to pay the contributions of the employees under consideration for the period of their military or naval service, even if they entered such service from the Federal Employment Service under the circumstances which you have described.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Municipality — Investment of Trust Funds.

FEB. 21, 1947.

House Committee on Municipal Finance.

GENTLEMEN: — Your committee has asked my opinion on the following question:

"Do the provisions of G. L. c. 44, § 54, as amended by St. 1946, c. 358, § 24, authorize the investment of trust funds held by a city or town, when not otherwise provided by the donor, in real estate mortgages?"

I answer your question in the negative.

G. L. (Ter. Ed.) c. 44, § 54, as amended by St. 1946, c. 358, § 24, reads:

"Trust funds, including cemetery perpetual care funds, unless otherwise provided or directed by the donor thereof, shall be placed at interest in savings banks, trust companies incorporated under the laws of the commonwealth, or national banks, or invested by cities and towns in paid-up shares of co-operative banks, or in bonds or notes which are legal investments for savings banks. This section shall not apply to Boston."

The phrase "bonds or notes which are legal investments for savings banks" cannot reasonably be said to indicate a legislative intent to authorize investment of trust funds in "real estate mortgages," and it is obvious that the other forms of investment mentioned in said section 54 do not include such mortgages.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Treasurer — Deposits by Fire Insurance Companies — Merger.

FEB. 21, 1947.

Hon. LAURENCE CURTIS, *Treasurer and Receiver General.*

DEAR SIR: — You have written me as follows:

"St. 1941, c. 654, § 2, provides that the State Treasurer may release deposits of domestic insurance companies 'if he is satisfied that the deposit or portion thereof requested to be returned is subject to no liability and is no longer required to be held by any provision of law of this commonwealth

or of any such other state or country or for the purpose of the original deposit.'

"I have been requested to release two deposits, each of $100,000.00, originally deposited by the Worcester Manufacturers Mutual Insurance Company and the Fall River Manufacturers Mutual Insurance Company, as a result of their merger with the Boston Manufacturers Mutual Fire Insurance Company.

"My understanding is that under the above-cited section the State Treasurer holds these deposits 'in trust.' The general nature of the trust is for protection of the policy holders. It appears to me that there are quite a few questions of law involved in the decision as to whether these deposits might be needed any longer to protect the policy holders, and that before I release these deposits I should seek advice of my counsel, which I take it you are.

"I am therefore transmitting herewith the various papers supporting this request and I should appreciate it very much if you would advise me as to whether in your opinion the legal requirements outlined in the statutes for the release of such deposits have been complied with."

I am advised by the Department of Insurance that the deposits in question were made with you by two domestic mutual fire insurance companies, respectively, under the provisions of G. L. (Ter. Ed.) c. 175, § 185, as amended, to comply with the laws of the States of Alabama and Rhode Island. Said section 185 in its applicable parts reads:

"The state treasurer in his official capacity shall take and hold in trust deposits made by any domestic company for the purpose of complying with the laws of this commonwealth or of any other state or country to enable such company to do business in such state or country . . .

"The state treasurer may, upon written request of any domestic company, return to it the whole or any portion of any deposit held by him on behalf of such company, if he is satisfied that the deposit or the portion thereof requested to be returned is subject to no liability and is no longer required to be held by any provision of law of this commonwealth or of any such other state or country or for the purpose of the original deposit. . . ."

You have informed me and it appears from documents furnished by the Secretary of the Commonwealth that a merger has been effected by these companies with the Boston Manufacturers Mutual Fire Insurance Company, under the provisions of G. L. (Ter. Ed.) c. 175, § 19A, as amended. By the terms of this merger the Boston Manufacturers Mutual Fire Insurance Company receives all the assets of the other two companies and assumes all their liabilities. By the terms of the merger all the policies of the two first-named companies are reinsured and assumed by the Boston Manufacturers Mutual Fire Insurance Company. I am advised that the last-named company has a deposit with you under the provisions of said section 185 for the same purposes as those previously made by the other two companies.

You have shown me communications from the Insurance Commissioner of Rhode Island and from the Bureau of Insurance of Alabama stating that as a result of the merger the withdrawal of the respective deposits of the two merged companies has their approval. You have also shown me a communication from the Department of Insurance of this Commonwealth

stating that it has no objection to the release of the said deposits to the two now merged companies which originally placed them with you.

Although such deposits may be held in trust for all creditors and policyholders of the said merged companies, "the purpose" of such deposits was that said companies might comply with the laws of Alabama and Rhode Island so as to enable them to do business in those States. I assume that this is so from the facts stated in a letter to you from the Department of Insurance of February 5, 1947, which you have laid before me.

No provision of law of this Commonwealth required or now requires that such deposits be maintained with you by the two now merged domestic fire companies.

In view of the existence of the said merger, the fact that no law of the Commonwealth requires a deposit from these companies, and the assurance from the Insurance Departments of Alabama and Rhode Island that they do not object to the release of the deposits, as well as the acquiescence therein by the Department of Insurance of this Commonwealth, I am of the opinion that it would not be unreasonable for you to be "satisfied that the deposit . . . requested to be returned is subject to no liability and is no longer required to be held by any provision of law of this commonwealth or of any such other state or country or for the purpose of the original deposit," as the quoted words are used in said section 185. Accordingly, if you are so satisfied of the conditions set forth in the above-quoted provisions of said section 185 it would be proper for you to return the two deposits in question.

There is nothing in the considerations which I have set forth in opposition to the decision of the Supreme Judicial Court in *McMurray* v. *Commonwealth*, 249 Mass. 574.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Armories — Non-military use — Rules — Permit — Inspection.

FEB. 21, 1947.

Gen. WILLIAM H. HARRISON, JR., *Adjutant General.*

DEAR SIR: — I have received from you the following communication:

"In view of the increased use of State-owned armories by outside parties, an early opinion is requested as to the responsibility of this department that the lessee comply with the permit issued by the Department of Public Safety.

"The permits issued by this department are issued subject to compliance with local, State, and Department of Public Safety regulations. (Copy of permit attached.)"

The permit issued by your department to which you refer is granted for the use of an armory under the provisions of G. L. (Ter. Ed.) c. 33, § 41, upon the following conditions which are printed thereon, among others:

"4. This permit is granted subject to:

"*a.* Rules and regulations governing the use of state-owned armories as published by this Division under the authority of Section 41, (a), of said Chapter 33 relative to the safeguarding of public property and cleaning the armory after its use.

"*b.* Statutory regulations relative to inspection and approval as a place of assembly for the purpose in question by local and/or state authorities under the provisions of Chapter 143 of the General Laws as amended.

"*c.* Issuance of, and compliance with, certificate of inspection by the State Dept. of Public Safety.

"*d.* Compliance with Local, State and Federal law and regulations where applicable."

I am informed that the Department of Public Safety makes an initial examination of an armory as a "public hall" and forwards the result of the same to you and issues a certificate of inspection in respect thereto and a permit for use.

Prior to the amendment of G. L. (Ter. Ed.) c. 143, § 1, by St. 1946, c. 363, by definition a "public hall" by specific exception did not include an armory. By the said amendment an armory was not specifically excluded from the definition of a "public hall." Nevertheless, by the express terms of said G. L. (Ter. Ed.) c. 143, as amended, buildings owned by the Commonwealth are excepted from the provisions of the chapter relative to inspections under the ordinances of municipalities (G. L. (Ter. Ed.) c. 143, § 3, as amended) and from the scope of inspections by the Department of Public Safety under section 33 of said chapter 143, as amended. There is no provision requiring the inspection of armories by the Department of Public Safety. The mere change in definition of a "public hall" cannot supply the place of a statutory provision requiring the said department to inspect armories, which are buildings owned by the Commonwealth.

Irrespective of whether or not the Department of Public Safety is required to issue a certificate of inspection and a permit to use an armory for indicated purposes, no duty to inspect the armory for violations of laws or permits rests upon the Department of Public Safety, since an armory is a building owned by the Commonwealth which, as I have pointed out, is excluded by the terms of said chapter 143, as amended, from the requirement of such inspection.

This being so, the duty of inspection of the use of an armory to see that the so-called lessee thereof is observing the conditions of the permit that you issue to him, which conditions include compliance with the applicable statutory laws and the certificate and permit given by the Department of Public Safety, particularly as they relate to fire hazard, rests upon your department as the governmental agency in charge of the use of armories and the one which issues permits for their use and occupancy.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Examiners of Plumbers — Town Regulations by By-law — Plumbing Inspector.

FEB. 25, 1947.

Mrs. MAE MANNING, *Director of Registration.*

DEAR MADAM: — I acknowledge your letter of February 12, 1947, in which you ask my opinion for the Board of Examiners of Plumbers as follows:

"(*a*) Is it mandatory that the Town of Shrewsbury adopt plumbing regulations under the authority of either Sections 8 and 9 or Section 13, Chapter 142, General Laws?

"(*b*) If the answer to the preceding question is 'no,' can the Town of Shrewsbury legally appoint a plumbing inspector who is not qualified under Sections 11 and 12, Chapter 142, General Laws?

"(*c*) If the answer is 'yes,' what procedure can the Board of Examiners of Plumbers use to compel the Town of Shrewsbury to comply with the applicable provisions of Chapter 142, General Laws?"

It appears that the town of Shrewsbury adopted its own plumbing by-law by vote of its inhabitants on December 20, 1921. Approval was given to this by-law by the Attorney General on April 28, 1922, and this by-law is still in force. No evidence appears that the town has ever specifically adopted any of the sections of chapter 142 in their present form or corresponding provisions of earlier laws, nor does it appear that the town has ever requested rules formulated by the Examiners under sections 8 and 9 of said chapter 142.

The application of chapter 142 is governed by section 2, the pertinent portion of which is as follows:

". . . Sections one, three, six and seven and sections eleven to sixteen, inclusive, shall apply to all towns which by vote of their inhabitants accept said sections or have accepted corresponding provisions of earlier laws, and said sections, except section thirteen, shall apply to all towns which accept rules formulated by the examiners under sections eight and nine or have accepted them under corresponding provisions of earlier laws."

It is my opinion that under this section the provisions of chapter 142 do not apply to Shrewsbury. It is also my opinion that the requirements of section 13 have been satisfied by the by-law of the town which is above referred to and which is now in force.

Therefore, I answer the three questions propounded by your letter as follows:

(a) In my opinion it is not mandatory that the town of Shrewsbury adopt plumbing regulations under sections 8, 9 or 13 of chapter 142.

(b) The town of Shrewsbury may appoint a plumbing inspector pursuant to its own town by-law, which plumbing inspector may not be qualified under sections 11 and 12 of chapter 142.

(c) The town of Shrewsbury not being subject to the provisions of chapter 142, the Examiners of Plumbers cannot compel the town to comply with any of its provisions.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Retirement System — Eligibility of Certain Member of Organized Militia.

MAR. 10, 1947.

Hon. LAURENCE CURTIS, *Chairman, State Board of Retirement.*

DEAR SIR: — I am in receipt from you of the following communication:

"The State Board of Retirement had before it at its last meeting the enclosed letter of February 10, 1947 from the Adjutant General's office requesting information as to eligibility to join the State Retirement System of certain persons of the Massachusetts Organized Militia.

"It appeared to the Board that the answer was not entirely clear under the governing statutes, and it was voted that an opinion be requested from the Attorney General.

"The Board will very much appreciate such opinion."

The letter enclosed with your communication is from the Adjutant General and reads:

"1. Information is desired as to whether an officer or enlisted man of the Massachusetts Organized Militia who is detailed to duty by proper orders to the Military Division of the State, to which duty he devotes his entire time, and who is paid from State funds, is eligible to become a member of the State Retirement System.

"2. We have two officers on duty now who have been detailed to this Division for periods of 10 to 25 years, paid entirely from State funds, and whose sole employment is by the State."

I know of no reason why the officers referred to in the Adjutant General's letter, who have been detailed to his department for duty for periods of from ten to twenty-five years, who are paid by State funds and devote all their time to the duties of their respective positions in said department, are not eligible, if other qualifications, such as age, called for by G. L. (Ter. Ed.) c. 32, as amended, are possessed by them, to be members of the State Retirement System.

From the above facts, which the said letter and communication set forth, these officers would appear to fall within the definition of "employee" as used in the second sentence of the eighteenth paragraph of section 1 of chapter 32 of the General Laws, as amended.

The provisions as to what employees shall be eligible for membership in a retirement system, to be found in said chapter 32, section 3, appear to include such an "employee" as the two officers to whom you refer. There appears to be no provision of said chapter 32 specifically or by implication denying the privilege of membership to officers or enlisted men of the organized militia engaged in full time duty in a department under conditions such as are described in the said letter and communication.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Department of Public Utilities — Hearings — Appearance of Persons not Attorneys-at-Law.

MAR. 13, 1947.

HON. CARROLL L. MEINS, *Chairman, Department of Public Utilities.*

DEAR SIR: — In your recent letter you state that the appearance before your department in behalf of several competing motor vehicle carriers, in opposition to an application for a regular route common carrier certificate, of a former employee of your department, who is not a lawyer, and was retired last year on pension, is objected to on the following grounds:

1. That, as a retired employee, he is subject to recall to duty in the department under the emergency war powers of the Chief Executive; and

2. That, not being an attorney-at-law qualified to practice in the Commonwealth, he is not authorized under G. L. (Ter. Ed.) c. 159B, § 2 to represent parties at such hearing.

As to the first ground above stated, you have not asked my opinion. However, it apparently has not come to the attention of counsel making this objection that the power of the department to recall to service employees who have been retired was given by St. 1942, c. 15, § 1, as amended by St. 1943, c. 502, § 1. This power terminated on June 26, 1946, by virtue of St. 1946, c. 55. The amendment contained in St. 1946, c. 306, does not affect such termination in the case of a retired employee of your department, and I am not aware of any exercise of any emergency war power which authorizes the re-employment of any such retired employee.

While it may be within the power of your department to exclude former employees from appearing before the department, I am not aware that any such exclusion order has ever been made and assume that you have no intention of excluding the former employee in question on that ground.

With regard to the other ground of objection, you have asked me the following specific question:

"Do the provisions of G. L., c. 159B, § 2, defining the term 'Hearings,' forbid the appearance at a hearing held under such chapter as representing a party to the proceedings of any person other than a qualified attorney at law?"

The foregoing question refers to the following definition contained in G. L., c. 159B, § 2, as amended:

" 'Hearings' provided for by this chapter shall be public, upon written notice to the material parties thereto, with the right to such parties to appear in person and to be represented by counsel, and with each witness testifying on oath."

There are no decisions of the Supreme Judicial Court of this Commonwealth upon the question whether the word "counsel," in the foregoing definition, is restricted to an attorney-at-law. The following decisions relative to that word, in statutes of other states, construe it as meaning an attorney-at-law:

Baker v. *State* (Okla.) 130 P. 820.
Ingraham v. *Leland*, 19 Vt. 304, 307.
State v. *Russell*, 83 Wis. 330.
Ludlam v. *Broderick*, 15 N. J. L. 269, 271.
Harkins v. *Murphy & Bolanz* (Tex.), 112 S. W. 136.

See also, as to the word "counsel" in the Federal Constitution, Sixth Amendment, and in the Constitution of Alabama, respectively:

United States v. *Ragen*, 52 F. Supp. 265, 270.
Ex parte Lamberth, 242 Ala. 165, 167.

The foregoing cases seem to be decisive and I therefore advise you that the statute above cited forbids a person other than an attorney-at-law to represent a party to a proceeding under G. L., c. 159B, as amended. However, the contention might be made that the word "counsel" in the statute includes any person whom your department permits to appear before it as counsel, even though not an attorney-at-law. In view of this possible contention, it seems desirable to consider the effect upon the case before your department of G. L., c. 221, § 46A, as appearing in St. 1935, c. 346, § 2, which reads as follows:

"*Section 46A.* No individual, other than a member, in good standing, of the bar of this commonwealth shall practice law, or, by word, sign,

letter, advertisement or otherwise, hold himself out as authorized, entitled, competent, qualified or able to practice law; provided, that a member of the bar, in good standing, of any other state may appear, by permission of the court, as attorney or counselor, in any case pending therein, if such other state grants like privileges to members of the bar, in good standing, of this commonwealth."

Under the foregoing provision of law, if the conduct of a hearing before a quasi-judicial tribunal, such as your department, in behalf of several parties, is the practice of law, then it is forbidden by the foregoing section. If this is so, the failure of objecting counsel to cite or mention G. L., c. 221, § 46A, does not prevent you and your associates from performing your plain duty. You should refuse to permit a person, who is not a member of the bar, and who is objected to as not being a member of the bar, to practice law before you, if that is what he is doing, irrespective of the form of language in which the objection is put. Our Supreme Judicial Court has repeatedly gone behind the form to the substance of the transaction, where the practice of law is concerned.

Graustein v. *Barry*, 315 Mass. 518, 520, 521.
Gill v. *Richmond Co-operative Assoc. Inc.*, 309 Mass. 73, 76.
Sherwin-Williams Co. v. *J. Mannos & Sons, Inc.* 287Mass. 304, 311.

The question whether taking part in contested hearings before a quasi-judicial body, such as your department, is the practice of law, has not been clearly determined by our Supreme Judicial Court. This question was the subject of comment, but not decision, in *Lowell Bar Assn.* v. *Loeb*, 315 Mass. 176, at pages 184 and 185. However, I can conceive of no activity before an administrative tribunal which more clearly requires the services of an attorney-at-law of learning and ability than taking part in a contested trial before your department. If that is not the practice of law, no activity before an administrative tribunal in this Commonwealth is the practice of law. The art of advocacy is there developed in one of its highest forms. Learned counsel of eminent ability frequently appear before your body. The proceedings are sharply contested and often protracted.

Procedure before the commission of your department is regulated by several statutes, among which is G. L., c. 25, § 5, requiring the commission to rule upon questions of substantive law, and to act upon written requests for rulings. The proceedings are taken down stenographically, and hearings are conducted much like trials in court. The statute last cited provides for appeals to the Supreme Judicial Court. Such appeals are not infrequent. The statute gives them precedence over ordinary civil proceedings, and the questions presented are among the most difficult coming before that tribunal.

In view of the foregoing facts and statutes, it is my opinion that the conduct of contested hearings before your department is the practice of law.

A recent decision in point is *State* v. *Childs*, (Neb.) 23 N. W. (2d), 720, in which, in one case, it was charged that the defendant before the Nebraska State Railway Commission "acting as an attorney at law in behalf of his clients, prepared and filed pleadings and other documents therein, examined and cross-examined witnesses . . . objected to the introduction of testimony . . . and made arguments before said commission in support of the petition and those for whom he appeared." It also appeared that the case involved difficult questions of law and fact. The trial procedure

before the Nebraska Commission was described, which is similar to that before your commission. The opinion also stated that the respondent took part in the making of a record in contemplation of a judicial review.

In that case and another in which he acted as counsel and submitted a brief, the court held that the defendant performed services which required legal training, experience and skill, and that he was guilty in those two cases of the illegal practice of law. The court also said, at page 723: "It is the character of the act and not the place where the act is performed that constitutes the controlling factor."

At an earlier stage of the same case, the court said, referring to the defendant's alleged skill as a rate expert, 295 N. W. 381, 383, 384:

"We do not doubt that respondent possesses high qualifications in the transportation rate field. But the fact that he can qualify as an expert in a particular field will not permit his engaging lawfully in the profession of law without a license to do so."

See also, *People* v. *Goodman*, 366 Ill. 346.
Clark v. *Austin*, 340 Mo. 467, esp. p. 481.
Shortz v. *Farrell*, 327 Penn. St. 81.
State v. *Wells*, 191 S. C. 468.

In *Lowell Bar Assn.* v. *Loeb*, 315 Mass. 176, the court said, at page 184, speaking of practice before the Appellate Tax Board:

"If such practice by one not a member of the bar is the practice of law, no rule of such a tribunal can legalize it."

Before that board, cases may arise that lie solely within the realm of accounting, and it is barely possible that the Supreme Judicial Court might sustain the rule permitting accountants to practice before that board in such cases. Your department has no such rule. Cases before it sometimes involve questions of accounting, engineering, or rate-making; but the usual activity of the engineer, accountant or rate expert is that of a witness or adviser, rather than of a counsel conducting the hearing. It may be that "practitioners" who are not lawyers have occasionally conducted hearings before your department, especially its commercial motor vehicle division, but I am aware of no rule or custom of your department attempting to authorize such action. Even if there were such a rule or custom, the language of the Supreme Judicial Court last quoted seems to imply that it would be invalid.

Nor do the practices of various Federal tribunals, in permitting laymen to act as counsel before them, alter my opinion that the services rendered in this Commonwealth before your department in contested hearings are not authorized to be rendered by laymen. The opinion of our Supreme Judicial Court in *Lowell Bar Assn.* v. *Loeb*, *supra*, at the bottom of page 184 and the top of page 185, in 315 Massachusetts, throws doubt upon the effect of those practices in matters not legally before such a tribunal, though of a class that might come before it. *A fortiori* they should not affect the practices of your tribunal in matters not arising under Federal laws, but under the laws of this Commonwealth.

For all the foregoing reasons, I advise your department not to permit the person mentioned in your letter to appear before it as counsel.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Public Welfare — Schooling for Children in Boarding Homes.

MAR. 17, 1947.

Hon. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — In connection with children of school age who have been placed in boarding homes in various towns for the purpose of providing such children "with care, food and lodging," as the quoted words are used in G. L. (Ter. Ed.) c. 119, § 1, either by the Commonwealth or by their parents, you have asked my opinion as to the right of such children to attend the public schools of the town in which such a home may be and as to who may be liable to pay such a town for tuition.

Although the Attorney General, following a long line of practice and procedure of this department, does not ordinarily render opinions involving merely the interpretation of statutes, nevertheless, as the subject matter of your request may be directly connected with the duties of your department in regard to children placed in boarding homes, I advise you in the premises as follows:

By the provisions of G. L. (Ter. Ed.) c. 76, § 5, it is provided that:

"Every child shall have a right to attend the public schools of the town where he *actually* resides, subject to the following section . . ."

The following section 6, in its applicable portion reads:

"If a child resides temporarily in a town other than the legal residence of his parent or guardian *for the special purpose* of there attending school, the said town may recover tuition from the parent or guardian . . ."

It follows that if a child has been brought to reside in a town for the special purpose of attending school therein, whether he is in a boarding home or not, his parents or his guardian, if he has one in lieu of parents, is liable to such town for his tuition.

If schooling therein was not the special purpose for which he was brought to the town, he is entitled to tuition therein, for which his parents are not liable. The town where he *actually* resides in a boarding home may not lawfully refuse him tuition in its public schools.

There is a distinction between the words "actually resides" as used in said section 5 and the words "where he has his domicile."

The person in charge of the boarding home where the child has been placed is not liable for his tuition.

For the tuition of such a child placed in a boarding home in a town other than his home town, which would ordinarily be that of his parents' domicile, not by his parents but by the Department of Public Welfare, the Commonwealth, by the provisions of section 7 of said chapter 76, is to pay for tuition in the town of actual residence at a rate therein set forth.

I trust that the foregoing expression of my opinion as to the plain meaning of the relevant statutes will sufficiently assist you in dealing with problems relative to tuition of children in boarding homes which may come before you or which it may be necessary for you to discuss with town authorities.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Department of Conservation — State Ornithologist.

MAR. 19, 1947.

Hon. A. K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — Replying to your letter of March 17, 1947, prior to the amendment of G. L. (Ter. Ed.) c. 21, § 7A, by St. 1939, c. 491, § 5, the State Ornithologist was appointed and removed by the Director of the Division of Fisheries and Game, with the approval of the Commissioner, and performed "such duties as the director may from time to time prescribe."

By the said amendment of 1939 the provisions of St. 1934, c. 173, which carried the quoted phrase in its insertion of section 7A of chapter 21 in the General Laws, were repealed and a new section 7A adopted which still stands in the General Laws and reads:

"The commissioner may appoint and remove a state ornithologist who shall be qualified by training and experience to perform the duties of his office. He shall perform such duties as the commissioner may from time to time prescribe."

By this section the State Ornithologist serves under the direction of the Commissioner of Conservation and section 7C of said chapter 21, to which you refer, does not subject him to the direction of the Director of Wildlife Research.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Examiners of Plumbers — Master Plumbers — State Institutions — Employment by Corporations.

MAR. 21, 1947.

Mrs. IRENE K. RICHARDS, *Director of Registration.*

DEAR MADAM: — I acknowledge your recent letter in which you ask my opinion on several questions propounded by the Board of Examiners of Plumbers.

Your letter calls attention to the decision of the Supreme Judicial Court in the case of *Power* v. *Board of Examiners of Plumbers*, 281 Mass. 1. That case concerned the employment by the city of Worcester of a master plumber at a salary to supervise the installation of plumbing in connection with its municipal functions, and one of the questions decided was with relation to the place of business of the master plumber, as defined by G. L. (Ter. Ed.) c. 142, § 1. It was contended that the City Hall in Worcester was not a regular place of business within the meaning of this statute. The court said:

"The requirement that a master plumber shall have a 'regular place of business' is satisfied if the applicant for a master plumber's license has a place to do the business which he may be called upon to do as a master plumber, and that it must not necessarily be available to the public but must at all times be certain and not itinerant; that the words 'in his employ,' G. L. (Ter. Ed.) c. 142, § 1, are broad enough to cover journeymen plumbers who are not employed by him, but under their contracts with others are, nevertheless, to be subject to his orders and supervision."

You state that as a result of this opinion the Examiners have applied this opinion "to all manufacturing corporations and concerns" and you ask the following questions:

First: "Is the State Board of Examiners of Plumbers correct in its ruling?

Second: "Can the aforesaid master plumber in the employ of any corporation conduct and operate a private personal plumbing business legally, outside the precincts of the corporation?

Third: "If the answer to the second question is 'yes' is the State Board of Examiners of Plumbers obliged to issue duplicate licenses in order for the aforesaid master plumber to conform to G. L. c. 142, § 3."

In answer to your first question, any corporation which employs a master plumber for a salary to maintain, install or superintend its own plumbing system cannot be said to be in the plumbing business and would be in the same position as the city of Worcester in the *Power* case above cited, and the ruling of the State Board of Examiners in this respect as to these corporations, in my opinion, is correct.

In answer to your second question, a master plumber in the employ of a corporation for a salary on a basis similar to that in the *Power* case above cited may legally operate a private personal plumbing business outside of his employment by the corporation. There is nothing in G. L. (Ter. Ed.) c. 142 to limit the time of a licensed master plumber to his employment for a salary by such a corporation. Such a master plumber may, in my opinion, conduct a private plumbing business on his own time outside of such employment.

In answer to your third question, if the master plumber employed by such a corporation has a private plumbing business of his own outside of his employment by the corporation, it is my opinion that the display of his master plumber's license at either place conforms with section 3 of chapter 142. I see no reason for the issuance of duplicate licenses to be posted both at his place of employment by the corporation and at his private place of business.

You cite G. L. (Ter. Ed.) c. 142, § 21, with relation to the formulation of rules by the Examiners relative to the construction, alteration, repair and inspection of all plumbing work in buildings owned and used by the Commonwealth, subject to the approval of the Department of Public Health. You state that one of the requirements in these rules is that "permits shall be issued to licensed or registered master plumbers or such licensed or registered journeymen plumbers as are temporarily approved by the Board of Examiners."

You inform me that at a recent meeting of the Examiners of Plumbers it was voted to issue permits only to master plumbers in State institutions and you ask the following question:

"Was it necessary to receive the approval of the Department of Public Health on this action?"

Said section 21 has nothing to do with those licensed by the Examiners under section 3 of chapter 142 to do the actual plumbing work performed in accordance with such rules. The licensing of master and journeymen plumbers is the function of the Examiners of Plumbers, and their action in carrying out this duty is not subject to the approval of the Department of Public Health. It is, therefore, my opinion that it was not necessary

to obtain the approval of the Department of Public Health to the vote of the State Examiners of Plumbers to issue permits only to master plumbers in State institutions. What this vote really amounted to was that the above rule relative to the issuance of permits to do work in State-owned buildings was modified so that licensed or registered journeymen plumbers would no longer be temporarily approved as proper persons to be issued permits. Perhaps a better way of accomplishing this same result would have been for the Board of Examiners of Plumbers to vote not to temporarily approve licensed or journeymen plumbers to do work in State-owned or used buildings. This would be an exact compliance with the very rule which was formulated and approved by the Department of Public Health.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Registrar of Motor Vehicles — International Automotive Traffic — Treaty.

MAR. 25, 1947.

Mr. RUDOLPH F. KING, *Registrar of Motor Vehicles.*

DEAR SIR: — You have laid before me the text of the Convention on the Regulation of Inter-American Automotive Traffic, which is a treaty entered into by the United States with fourteen other American republics ratified by the Senate as set forth in a proclamation of the President November 1, 1946.

This treaty by its terms, among other things, permits the use in the United States of motor vehicles registered in the American republics of origin according to the laws of such countries. The operators of such motor vehicles are "subject to the traffic laws and regulations" in force in the country in which such vehicles are operating, but operators are to be permitted to operate if licensed by their country of origin. Like privileges are extended to owners of motor vehicles registered in the United States and operators licensed therein. Provisions are made for an emblem and a certificate to indicate registration in state of origin and for an operator's license for the same purpose.

Treaties of the United States, like the Constitution, are the supreme law of the land and where State laws are in conflict with a treaty, the treaty must prevail. *In re Wyman*, 191 Mass. 276. Treaties are not infrequently called conventions, as is the present one. *Vergnani* v. *Guidetti*, 308 Mass. 450, 457.

In relation to the effect of the said treaty, you have requested my opinion as follows:

"Your opinion is requested whether, under section 3 of chapter 90, I should make such a determination as described above, and whether or not the privileges granted by the Convention render inoperative the non-resident insurance provisions of said section."

By virtue of the said treaty you may determine under the provisions of G. L. (Ter. Ed.) c. 90, § 3, to which you refer, that the other republics signatory to the treaty grant privileges of operation unlimited as to length of time in the case of motor vehicles duly registered under the laws and owned by residents of the Commonwealth.

Inasmuch as the treaty makes no special provision for the existence of

a policy of liability insurance as necessary to registration or use of a motor vehicle, the privileges granted by the treaty render inoperative the non-resident insurance provisions set forth in said chapter 90, section 3, with relation to those motor vehicles to which the treaty relates.

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

Fire Commissioner — Fires in the Open Air — Bonfire — Domestic Incinerators.

MAR. 27, 1947.

Hon. A. K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — I am in receipt from you of the following letter:

"Will you kindly pass upon whether the forest fire warden, the chief or fire commissioner has the authority in regulating the time when fires can be had in outside domestic incinerators?

"You will note by the attached copy of chapter 269 and underscored in red, that part which pertains to the issuing of permits of burning in the open.

"Whether the town officials can construe a fire in an incinerator as an open air fire, we are very desirous of knowing."

Chapter 269 of the Acts of 1945 amended G. L. (Ter. Ed.) c. 48 by inserting a new section 13.

Chapter 269 was an emergency act entitled "An Act relative to the issuance of permits for open air fires" and in its preamble recited that the act related "to certain restrictions on the setting of fires in the open air" during April and May.

It provides, among other things, that "no person shall set, maintain or increase a fire in the open air at any time except by permission, covering a period not exceeding five days," granted by certain designated officials. It provides penalties for the violation of its provisions.

Prior to the enactment of St. 1897, c. 254, § 10, from which said section 13 stems, a long series of legislative enactments making it an offense to set fires in various designated dangerous places out of doors had always referred to such fires as "bonfires." The term "fire in the open air" first appears in said statute of 1897, which was entitled "An Act to provide for the further protection of trees and the preventing of fires in woodlands."

The word "bonfire" as used in the context of the earlier statutes would appear to connote a fire for burning brush, grass or similar objects not confined in a small container.

I am of the opinion that the Legislature employed the words "fire in the open air" as used in said statute of 1897 and amendments or substitutes therefor, including G. L. (Ter. Ed.) c. 48, § 13, in view of their context, in the same manner as they had previously used the word "bonfire," having particularly in mind the danger from the spreading of unconfined fires.

I am of the opinion that the words "fire in the open air" as used in said section 13 were not intended by the Legislature and consequently do not include what is ordinarily meant by "outside domestic incinerators."

Very truly yours,

CLARENCE A. BARNES, *Attorney General.*

State Prison Colony — Chief Medical Officer — Autopsy — Medical Examiner.

APR. 9, 1947.

Hon. J. PAUL DOYLE, *Commissioner of Correction.*

DEAR SIR: — You have asked my opinion in the following phraseology:

"I respectfully request your opinion as to whether or not, and how soon after death, the chief medical officer of the State Prison Colony hospital, if the cause of death cannot be determined, may cause an autopsy to be made upon the unclaimed body of a prisoner where consent of the next of kin has not been obtained or the provisions of the aforesaid G. L. c. 38, § 6, has not been ordered."

The only authority given to the chief medical officer of the State Prison Colony, which colony as a "public institution supported in whole or in part at the public expense" is an institution impliedly named in G. L. (Ter. Ed.) c. 113, § 1, is that set forth in section 5 of said chapter 113. Said section 5 reads:

"Before surrendering the body of any such person as provided in the four preceding sections, the chief medical officer of any institution named in section one may, if the cause of the death cannot otherwise be determined and if such body is unclaimed by relatives or friends, cause an autopsy to be made upon it."

The four preceding sections provide for surrendering the bodies of persons dying in designated public institutions, which bodies are required to be buried at public expense, to medical schools upon their request for the promotion of anatomical science. The bodies of certain of such persons are specifically excepted from the foregoing provisions by section 2 of said chapter 113. It is provided that such medical schools are to take the bodies within three days after death and shall not use them for anatomical purposes until fourteen days after death and then only if such bodies still remain unclaimed by kindred or friend.

Reading these sections together it is apparent that only in cases where the provisions of G. L. (Ter. Ed.) c. 38 do not require action by the medical examiner of the district and only *when the cause of death cannot otherwise be determined* and the body is unclaimed by relatives or friends and is not that of a person mentioned in said section 2, may the chief medical officer of the State Prison Colony cause an autopsy to be made upon it. Moreover, he must do this within three days after the death, for at the close of such period the body must be delivered to a medical school if request is made, the requirement of section 1 for delivery to such a school upon request being mandatory (II Op. Atty. Gen. 1; see 1937 Op. Atty. Gen. 87, 88; Opinion of Attorney General to State Board of Insanity, Feb. 1, 1916).

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Logan Airport — Authority of Police.

Apr. 15, 1947.

Hon. Thomas F. Sullivan, *Police Commissioner.*

Dear Sir: — I am in receipt from you of a request for an opinion upon certain questions relative to the authority of the police department of the city of Boston to police the Logan International Airport.

As has been said in a long line of opinions of my predecessors in office, it is not the duty of the Attorney General to render opinions to the Police Commissioner upon all questions of law which may arise in the course of the latter's performance of his duties, but the subject matter of your present inquiries is of such a nature, relating as it does to land of the Commonwealth, that I deem it proper to advise you upon the questions which you have asked, which read as follows:

"1. Does the primary responsibility for policing the Logan International Airport rest upon the Commonwealth of Massachusetts?

"2. Has the Boston Police Department concurrent jurisdiction in the policing of this State-owned property?

"3. The Logan International Airport, including what was formerly Governor's Island and Apple Island, being part of the City of Boston, may the Boston Police Department properly include this area within the boundaries of Police Division Seven, or the East Boston Police District?"

I answer your first question in the affirmative and the last two in the negative.

The Logan International Airport is built upon land owned by the Commonwealth and is exclusively within its control (1942–4 Op. Atty. Gen. 47).

Land acquired by the Commonwealth is not generally subject to control by municipal police departments. When such control is deemed desirable, specific legislative authority to exercise it is granted by the General Court (see G. L. (Ter. Ed.) c. 81, §§ 11, 19). Lands such as reservations, parks and boulevards of the Commonwealth placed by the Legislature under the control of a State agency or authority are not subject to entry or control by municipal police except for such purposes as may have been specifically granted to such police by statutory provisions. II Op. Atty. Gen. 363, 454.

Such a State agency or authority has been created by the Legislature for the Logan International Airport and empowered by it to maintain and operate the airport, which is owned by the Commonwealth itself. This agency or authority is the "bureau for the maintenance and operation of said airport" established by the Commissioner of Public Works (St. 1941, c. 695, § 14, as amended by St. 1946, c. 583, § 5). As regards the said airport, such agency or authority alone has jurisdiction to police it, even if the airport is within the limits of the city of Boston, and the police department of Boston does not have concurrent jurisdiction in this respect and the department may not properly for any purposes of police supervision or control include said airport in Police Division Seven or the East Boston Police District.

The police of the city of Boston are confined in their authority as regards the said airport to the pursuit and apprehension of persons who have committed a breach of any statute, ordinance or regulation within the city of Boston outside the airport and have taken refuge in the said air-

port, and they have no authority to enter said airport for the purpose of maintaining peace and order therein except at the request of said bureau established for the maintenance and operation of the airport as aforesaid (see II Op. Atty. Gen. 454; 1942–4 Op. Atty. Gen. 47, 48; *Teasdale* v. *Newell, etc., Co.,* 192 Mass. 440).

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Use of Arms or Great Seal of the Commonwealth.

APR. 16, 1947.

Port of Boston Authority.

GENTLEMEN: — You have submitted to me various designs for an "insignia for the Port" and have asked my opinion as to whether their use by the said Authority would be unlawful.

I am of the opinion that the use of any of the designs which you have submitted would not be unlawful if used by the said Authority.

Each contains what purports to be a representation of the arms or the great seal of the Commonwealth. The use of any representation of the arms or the great seal of the Commonwealth "for any advertising or commercial purpose" is made a penal offense by G. L. (Ter. Ed.) c. 264, § 5, as amended.

A use of the arms or great seal by a board established as an agency of the Commonwealth, as was your board by G. L. (Ter. Ed.) c. 6, as amended by St. 1945, c. 619 and by G. L. (Ter. Ed.) c. 91A, for its own purposes is not a use for "advertising or commercial purposes" as those words are employed in said chapter 264, section 5. Such use is rather for a governmental purpose.

In your letter you speak of your intention to use this insignia "in advertising." I assume that by the use of the quoted words you mean only a use in connection with promoting the Port of Boston as such and not in aid of any private interests. This being so, I see no objection as a matter of law to your use of any of the designs showing a representation of the arms or great seal which you have exhibited to me.

A somewhat similar use of the seal to that which I gather from your letter you propose to make was held to be lawful when employed by the Division of Savings Bank Life Insurance. (See Opinion of Attorney General to the Governor, November 2, 1925.)

I see no objection as a matter of law to your describing the Port Authority on the said insignia as "An Agency of the Commonwealth," nor to your employing such insignia as you refer to in your communication as a device upon your letter paper.

Although it is not a duty of the Attorney General to pass upon the "propriety" of the designs for the insignia, yet since you have asked me, let me say that the largest of the four designs laid before me, having what purports to be a representation of the arms or seal of the Commonwealth in the center, appears to me the most appropriate and suitable for the purposes for which it is intended.

I return herewith the various designs which you sent me.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Public Utilities — Guided Trips in Boston for School Children — Sight-seeing Automobiles — Busses.

APR. 21, 1947.

Commissioners of Public Utilities.

GENTLEMEN: — In a recent letter you have asked my opinion as to whether the execution of a plan called "Education on Wheels," involving the furnishing for school children of guided trips in Boston by motor bus for the purpose of seeing and visiting places presumably of historical and civic interest, for a consideration paid by each child for each trip, is such as to require that the motor vehicle so used be licensed by the Police Commissioner of Boston and that there be obtained from you a certificate of public necessity and convenience under the provisions of St. 1931, c. 399, as amended by St. 1933, c. 93.

The pertinent provisions of the said statute provide:

"SECTION 1. The term 'sight-seeing automobile,' as used in this act, shall mean an automobile, as defined in section one of chapter ninety of the General Laws, used for the carrying for a consideration of persons for sight-seeing purposes in or from the city of Boston and in or on which automobile guide service by the driver or other person is offered or furnished.

"SECTION 2. It shall be unlawful for a person or a corporation to offer or furnish service by a sight-seeing automobile in or from the city of Boston unless said automobile is first licensed hereunder and unless thereafter a certificate of public convenience and necessity is obtained as hereinafter provided, and it shall be unlawful for a person to operate such an automobile as driver in or from said city unless he is licensed so to do as hereinafter provided."

Sections 3 and 4 provide that the Police Commissioner of Boston shall have exclusive authority to issue licenses to sight-seeing automobiles and persons driving them and to designate stands for them on the public ways, and section 5 requires that one offering or furnishing such sight-seeing service by automobiles must obtain from the Department of Public Utilities a certificate of public convenience and necessity. Furnishing such service in Boston without a license and a certificate is a penal offense.

Just what the plan in question consists of and just what its mode of operation is proposed to be are questions of fact. The Attorney General does not pass upon questions of fact.

You have submitted to me, however, certain letters and copies of documents relating to such plan and its proposed operation, from which it would appear that the plan in question is to be operated as follows:

Superintendents of school are to make contracts with a certain person doing business under the name of "Education on Wheels," by which such person agrees to act as the agent of a contracting superintendent and as such to charter motor busses for carrying school children on trips, to provide instruction en route by an instructor or leader, to provide meals, to arrange an itinerary, to pay all expenses of any trip and to collect a designated sum from each student on a trip, the total of such sums to reimburse for expenses paid and the balance to be the agent's compensation.

Assuming that the facts are substantially as I have set them forth, the arrangement made with "Education on Wheels" will result in the furnishing of "sight-seeing" automobiles and accordingly such automobiles when

operated in Boston must, as the Police Commissioner has previously ruled, be licensed by him and the driver likewise be licensed, and a certificate of convenience and necessity must be procured from your department.

The facts as they are to be gathered from the data which you have submitted to me indicate that the automobiles are to be furnished under the said plan for "sight-seeing" purposes. The fact that their use is limited to school children and that the trips have educational value does not detract from the essential "sight-seeing" which is a dominant characteristic of such use and does not differ materially in this respect from the characteristic use of automobiles ordinarily termed "sight-seeing."

There are uses of busses for the transportation of children between places which do not fall within the meaning of a "trip" or "trips" as I have employed those words in the foregoing paragraphs and which do not bring the vehicles so used within the category of "sight-seeing automobiles"; such as the transportation of children to or from school or church, or over the route of licensed common carriers of passengers or in a special or chartered bus operated under the provisions of G. L. (Ter. Ed.) c. 159A, § 11A. That the Legislature regarded "sight-seeing automobiles" as in a distinct and different class from special or chartered busses as such is made plain by the phraseology of said section 11A. My opinion is confined to a consideration of the mode and purpose of the class of transportation which, upon such facts as I have before me, appears to be offered by "Education on Wheels."

If it is desired that service such as is offered by "Education on Wheels" be excepted from the provisions of said St. 1931, c. 399, as amended, resort should be had to the Legislature.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Settlement of Veteran's Dependents.

APR. 22, 1947.

Hon. FRANCIS X. COTTER, *Commissioner of Veterans' Services.*

DEAR SIR: — You have asked my opinion with regard to the payment of veterans' benefits under G. L. (Ter. Ed.) c. 115, § 5, as amended.

The Attorney General does not pass upon questions of fact. From such circumstances as you have set forth it would appear that the veteran about whom you inquire established a residence in Quincy on or about January 23, 1943. You state that he had no settlement in the Commonwealth. It would seem from what you have stated that absences from Quincy since January 23, 1943 by the veteran were not of such a character as to indicate that he ceased to maintain a residence in that city, where you state he is now living. If this is so, he had had a residence in Quincy continuously for three years last past and would now be entitled to veterans' benefits, other matters being such as to warrant their payment under G. L. (Ter. Ed.) c. 115.

By virtue of his three years of residence, his dependents are likewise entitled to such benefits.

You do not so state but I assume from other facts set forth in your letter that the veteran's wife has a settlement in Quincy which she has retained, since from what you have stated it would appear that the husband has never acquired a settlement in Massachusetts. Under such circumstances

the veteran's dependents, who appear to be a wife and child, have a settlement in Quincy and under the provisions of G. L. (Ter. Ed.) c. 115, § 6, as amended, one-half the amount of veterans' benefits paid to the dependents should be reimbursed to Quincy by the Commonwealth and the full amount paid to the veteran, as an unsettled person, should be so reimbursed.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Fireman — Death — Medical Panel.

APR. 28, 1947.

Joint Legislative Committee on Pensions and Old Age Assistance.

GENTLEMEN: — I am in receipt from you, in connection with a certain bill which is before your committee, of the following request for my opinion:

"Whether or not under G. L. c. 32, § 89, a medical panel having reported that the death of a former member of the Springfield Fire Department was not an approximate result of a certain accident, it is legally possible for the city government to reopen the case and request an opinion by another medical panel."

I am of the opinion that the intent of the Legislature as it appears from the context of said G. L. (Ter. Ed.) c. 32, § 89, as amended, was not to authorize the filing of applications for annuities under said section 89 if an original application had been received, a board appointed under the provisions of said section 89 to pass upon the question of whether the death of the employee to whom the application referred was the natural and proximate result of an accident or hazard sustained during employment, and said board had found that such death was *not* the natural and proximate result of such an accident or hazard.

If the Legislature had intended that more than one application might be filed and new determinations of different boards be obtained upon the same subject matter, it would undoubtedly have so stated.

In the absence of such a plain statement the said section 89 cannot by implication be construed as permitting repeated applications and repeated determinations, a process which might go on indefinitely until the applicant finally succeeded in obtaining a favorable decision from some board.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Constitutional Law — Interference with Federal Operations by the Exercise of the State's Police Power.

APR. 30, 1947.

House Committee on Bills in the Third Reading.

GENTLEMEN: — You have asked my opinion as to whether Senate Bill 256, entitled "An Act further regulating the powers of the Department of Public Health relative to the protection of the public health," if enacted into law would be constitutional.

I am of the opinion that it would not be constitutional.

The proposed bill reads:

"Section 17 of chapter 111 of the General Laws, as most recently amended by chapter 340 of the acts of 1937, is hereby further amended by adding at the end the following paragraph: —

"The construction, arrangement and operation of dams, dikes, ditches, flumes, spillways and other like works within the commonwealth by the United States affecting the drainage of territory within the commonwealth shall be subject to the approval of the department and the department may require such changes therein as in its judgment are necessary for the protection of the public health."

The provisions of the bill are of general application in relation to all actions of the United States in constructing or operating the indicated types of work within the Commonwealth.

It applies to works undertaken by the United States in fields as to which the United States has paramount authority, such as its jurisdiction over navigable waters or flood control, as well as many others, and as to all these it seeks to limit the exercise of the power of the Federal Government by limiting its operation in matters which may well be essential to the proper exercise of such power by requirements of a State department. A practical veto power by the Department of Public Health over operations of the United States purports to be given.

The exercise of this power by the said State department would obviously contravene or materially affect the essential purpose expressed by many Congressional acts and limit the effective operation of the Federal Government in matters as to which it has paramount and complete jurisdiction. *Sturges* v. *Crowninshield*, 4 Wheat. (U. S.) 122, 193.

In matters as to which the United States has no jurisdiction the bill, of course, can serve no useful purpose, for as to those the United States may not engage in the operations mentioned in the bill with or without the approval of the State department.

It has been held that the United States may perform its functions without conforming to the police regulations of a State, and that if Congress has power to authorize the construction of a dam its agents are under no obligation to submit the plans to the State engineer for approval, as required by the State statute. *Arizona* v. *California*, 283 U. S. 423, 451, 452.

"The activities of the Federal Government are free from regulation by any state." *Mayo* v. *United States*, 319 U. S. 441.

The bill does not purport to exercise the police power of the State in regard to matters merely incidental to the exercise of activities within Federal jurisdiction or to such as are not included within the scope of such jurisdiction.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Public Safety — Keeping or Storing of Compressed Air — Certificate.

MAY 19, 1947.

Hon. JOHN F. STOKES, *Commissioner of Public Safety.*

DEAR SIR: — You have asked me the following question:

Does a tank or receptacle which is intermittently filled with oil and compressed air come within the provisions of G. L. c. 146, § 34, so that it

should be classified as a tank or other receptacle for the storing of compressed air and therefore require a certificate of inspection issued by the Division of Inspection of the Department of Public Safety?

The answer to this question depends upon the construction to be given to the word "storing" as used in this statute.

St. 1913, c. 399, §§ 1, 7, and St. 1914, c. 649, § 1, from which the present statute stems, prohibited the installation or use of a tank or other receptacle for the "*keeping or storing*" of compressed air at any pressure exceeding fifty pounds per square inch unless a certificate of inspection was issued, etc.

The phrase "keeping or storing" was shortened by the compilers of the General Laws of 1932 by omitting the words "keeping or." Such a change made in the compilation of the existing statutes does not indicate a legislative intention to employ the word "storing" as if it did not include the meaning of the word "keeping" and to so work a change in the intent of the statute.

"It is a familiar principle of statutory construction that mere verbal changes in the revision of a statute *do not alter* its *meaning* and are construed as a continuation of the previous law."

Arthur A. Johnson Corp. v. *Commonwealth*, 306 Mass. 347, 353.

So construed in the light of the earlier acts, the present statute (G. L. (Ter. Ed.) c. 146, § 34) would seem to include a tank of the description mentioned in your letter, and I accordingly advise that such a tank or receptacle requires a certificate of inspection issued by the Division of Inspection of the Department of Public Safety.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Commissioner of Conservation — Power to Lease Land — Permits.

MAY 26, 1947.

HON. A. K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — I am in receipt from you of the following letter:

"Is it permissible for me as Commissioner of Conservation to grant a lease for a concession to run for a term of more than one year? If so, what is the maximum term for which a lease can be given?

"The matter has come up of a boat livery concession at Salisbury Beach and it will require considerable capital investment on the part of the lessee and he feels that the amount necessary to make the proposition operative, a term of years must be had to bear the capital investment."

I am not aware of any authority vested in the Commissioner of Conservation to lease land of the Commonwealth in a State park or reservation for a "concession," so called.

I have been informed that "*permits*" were issued for boat leasing concessions at Salisbury Beach reservation, and this may be done by you under G. L. (Ter. Ed.) c. 132A, § 7.

If the rules and regulations which you have made under said section 7 do not limit the term for which such a permit may be issued, it may be

issued for such term of years as in your judgment appears to be reasonable in view of the nature of the concession and what the concessionaire must do to make it operative.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Department of Public Works — Lease of Province Lands.

JUNE 9, 1947.

Hon. WILLIAM H. BURACKER, *Commissioner of Public Works.*

DEAR SIR: — I am in receipt of your request for my opinion as to whether the Department of Public Works can lease approximately 375 acres of the Province Lands at Provincetown to that town for twenty years for use as an airport.

G. L. (Ter. Ed.) c. 91, section 2, provides in part as follows:

"The department" (of public works) "shall, except as otherwise provided, have charge of the lands, rights in lands, flats, shores and rights in tide waters belonging to the commonwealth, and shall, as far as practicable, ascertain the location, extent and description of such lands; investigate the title of the commonwealth thereto; ascertain what parts thereof have been granted by the commonwealth; the conditions, if any, on which such grants were made, and whether said conditions have been complied with; what portions have been encroached or trespassed on, and the rights and remedies of the commonwealth relative thereto; prevent further encroachments and trespasses; ascertain what portions of such lands may be leased, sold or improved with benefit to the commonwealth, and without injury to navigation or to the rights of riparian owners; and may lease the same . . . all leases for more than five years . . . shall be subject to the approval of the governor and council."

By section 25 of the said chapter 91, general supervision of so much of the Province Lands at Provincetown as lies north and west of a certain line described in said section 25 is given to the Department of Public Works; and by section 26 of the said chapter 91 all of the Province Lands lying east and south of that certain line described in section 25 are withdrawn from the sweep of said section 2 of said chapter 91, and from that of other enumerated provisions of law nor here pertinent.

It is plain from section 2 and from the provision of section 26 that section 2 does not apply to that portion of the Province Lands lying east and south of the demarcation line established by section 25, but that the authority given to the Department of Public Works by section 2 extends to the Province Lands committed to its general supervision, namely: those north and west of said certain line. (See Opinion of the Attorney General to the Board of Harbor and Land Commissioners, Nov. 15, 1915.)

The specific authority to lease is found in the last five words of the first sentence of section 2, "and may lease the same." No limit of time or purpose of such leasing is established, though it is interesting to note that R. L. c. 96, 3, the earlier statute from which G. L. c. 91, § 2, is derived, provided a time limit "not exceeding five years" for any lease. This five-year limitation on the term of a lease was dropped in G. L. c. 91, § 2, and the former provision of R. L. c. 96, § 3, requiring all leases to be submitted

for the approval of the Governor and Council has been changed by said section 2 so as to require that only those leases for more than five years shall be submitted for such approval.

From the letters you enclosed with your request, I note that the Massachusetts Aeronautics Commission has approved the site requested, thus satisfying the requirements of G. L. (Ter. Ed.) c. 90, § 39B. Furthermore, it is perfectly clear from G. L. (Ter. Ed.) c. 90, § 51D, that a city or town may establish, maintain and operate an airport.

Accordingly, I advise you that if the proposed area to be leased lies in the Province Lands north and west of the line established by said chapter 91, section 25, the Department of Public Works has the authority to lease the same to the town of Provincetown for a term of twenty years for use as an airport, subject to the approval of the Governor and Council.

The papers which accompanied your letter are herewith returned as requested.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Commissioner of Conservation — Power to Take Land under St. 1946, c. 510.

JUNE 11, 1947.

Hon. A. K. SLOPER, *Commissioner of Conservation.*

DEAR SIR: — I am in receipt from you of the following letter:

"Reference is made to St. 1946, c. 510.

"Information from some of the owners having property within the areas described in the act is sufficient to determine that all of the property the act describes cannot be purchased for the appropriation stated.

"Will you please advise me whether or not a portion of the property can be acquired if, in my opinion, the acquisitions are desirable to make in the public interest."

St. 1946, c. 510, authorizes the Commissioner of Conservation on behalf of the Commonwealth to take by eminent domain or to acquire by purchase at a total cost of not more than $38,000 approximately one hundred acres of land in Oak Bluffs and Edgartown specifically described by metes and bounds.

The extent to which property shall be taken or purchased for public use rests wholly in the legislative discretion. The Legislature may determine the amount of land to be taken or purchased and its location. It may delegate the authority to take or purchase to public officers, and when the Legislature specifically determines and describes the location to be taken or purchased such public officers are not vested with discretion to acquire any property but that specifically described by the Legislature.

I am advised that the one hundred acres authorized by the Legislature to be taken under St. 1946, c. 510, are a continuous strip of land on the waterfront comprising contiguous or nearly contiguous parcels of different ownership.

The acquisition of the entire strip on the waterfront appears to be an integral part of a plan incident to a public purpose for which the acquisition by taking or purchase for a specified sum was authorized, which plan might be defeated by the purchase of separated parcels or of insufficient parcels

to make up the entire strip when, as you state, the entire strip cannot be acquired for the limited compensation authorized by the statute.

This being so, it would appear that no implied intent on the part of the Legislature to authorize the acquisition only of some individual parcels within the designated strip, without the acquisition of the entire strip, can be gathered from the context of said St. 1946, c. 510.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Outdoor Advertising — Permits — Renewal — Inspection Fees.

JUNE 18, 1947.

Outdoor Advertising Authority.

GENTLEMEN: — In a recent letter you have informed me that renewal applications for licenses or permits for billboards or signs for the period from June 30, 1946, to June 30, 1947, were filed with the Department of Public Works by various persons engaged in the business of outdoor advertising thirty days prior to June 30, 1946, and were accompanied by the fee of two dollars, called the renewal fee, all as required by the rules of the said department then in force. The rules of said department for the control of billboards, etc., at that time contained a regulation that upon the actual issuance of a license or permit for a billboard or sign an additional fee of one dollar should be paid. This latter fee was called a "renewal inspection fee." These rules were made under authority of G. L. (Ter. Ed.) c. 93, § 29.

No action was taken upon these applications by the Department of Public Works.

On September 13, 1946, your board, which was created under the terms of St. 1946, c. 612, took over the powers and duties of the Department of Public Works with relation to outdoor advertising signs as set forth in G. L. (Ter. Ed.), c. 93, §§ 29, 30, by virtue of the provisions of said St. 1946, c. 612.

Section 6 of said chapter 612 provided that the rules for the control of billboards and signs previously adopted by the Department of Public Works should remain in force until superseded by others made by your board.

On March 4, 1947, your board promulgated new rules which repealed and superseded the old rules made by the said department. The new rules so made by you increased the additional fee previously called "the renewal inspection fee" from one to two dollars with relation to each sign of a certain size.

Prior to March 4, 1947, no action had been taken on the pending applications for permits or licenses for billboards and signs. After the making of the new rules on that date such permits or licenses were issued and you now ask me whether the permittees or licensees can be required to pay the increased sum of two dollars for the "additional" or "inspection fee" upon those signs of a size to which it relates.

I am of the opinion that they can be required to pay such increased fee, which is a dollar larger than the fee called for by the old rules.

Rules and regulations, like statutes, are not necessarily invalid because they have a retrospective aspect unless some vested right is impaired by

their force. No one acquires a vested right to obtain a permit or license for a particular fee by making application for such permit or license. It follows that the fee for a license may be increased after application, if before issuance.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Armories — Non-military Use — Public Parking.

JUNE 19, 1947.

Brig. Gen. WILLIAM H. HARRISON, Jr., *Adjutant General.*

DEAR SIR: — I am in receipt from you of the following letter:

"1. Information is requested as to whether this department has authority to permit the use of land, owned by the Commonwealth of Massachusetts, as a public parking lot, and as to the responsibilities and liabilities of the department in connection therewith.

"2. This request is occasioned by letters from the Police Commissioner of the City of Boston, and the Chairman, Board of Selectmen, Town of Brookline (copies of letters attached), requesting that land at the Commonwealth Armory, Allston, be opened for public parking during ball games at Braves Field."

In view of the provisions of G. L. (Ter. Ed.) c. 33, as amended, with relation to the use of armories, which by necessary implication includes land devoted to armory purposes, and the absence from the statutes of specific provisions giving your department power to employ lands which the Commonwealth holds for armory or other military purposes as public parking lots, I must advise you that you have no authority to permit the use of such land for public parking.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Civil Service — Tree Warden and Moth Superintendent in Haverhill — "Principal Department."

JUNE 23, 1947.

Mr. THOMAS J. GREEHAN, *Director of Civil Service.*

DEAR SIR: — You have asked my opinion as to whether the position of tree warden and moth superintendent of the city of Haverhill is subject to the Civil Service Law and Rules.

You inform me that it has been the view of your division that such position was within the sweep of the Civil Service Law and it has been treated as being subject thereto since 1922.

I am of the opinion that the view taken by your division is correct and that the position in question is subject to the provisions of G. L. (Ter. Ed.) c. 31, as amended, and the rule made thereunder.

From the facts of which I am advised it would appear that the only ground upon which it is suggested that such position is not subject to

civil service is that the incumbent is the head "of a principal department . . . of a city" and so specifically excluded from subjection to the Civil Service Law by the provisions of G. L. (Ter. Ed.) c. 31, § 5, as amended.

While it is by no means plain that the position in question is that of a head of any city department, it is clear that it is not that of a head "of a *principal* department" of the city of Haverhill.

The departments of the city of Haverhill are created by its ordinances. There are five separate departments created by Ordinance 97 of the said ordinances, to wit:

(*a*) Department of Finances and Accounts.
(*b*) Department of Highways.
(*c*) Department of Public Safety.
(*d*) Department of Public Property.
(*e*) Department of Health and Charities.

These five departments are referred to in Ordinance 98 as "the several *main* departments," and I am of the opinion that as a matter of law these five and no others are the "principal" departments of the said city as the word "principal" is used in said chapter 31, section 5. Under said Ordinance 98 "sub-departments of administration" are created and assigned to the service of the "main departments." Under the heading "Department of Public Property" five such sub-departments are assigned by said Ordinance 98, among which is "(*d*) Shade Trees and Moth Extermination." It is in this last-named sub-department that the position in question exists.

By Ordinance 95 it is provided that one member of the municipal council at a time shall act in rotation, subject to a general power of oversight in the council," as head of the department assigned to his charge and be known as the Commissioner of such department."

The duties of the position in question are set forth in chapter 19 of the said ordinances. It is by no means plain from an examination of them as set forth in said chapter 19 that the position in question could fairly be said to be the "head" of even the "sub-department" of "Shade Trees and Moth Extermination" in the main or principal Department of Public Property.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Public Welfare — Old Age Assistance — Ownership of Real Estate — Bond and Mortgage.

JUNE 24, 1947.

Hon. PATRICK A. TOMPKINS, *Commissioner of Public Welfare.*

DEAR SIR: — In a recent letter you have asked my opinion upon two questions relative to old age assistance.

1. With relation to your first question you have informed me of the following facts:

"Applicant applied for Old Age Assistance on October 25, 1943. Assistance has been granted continuously since that time. At the time of application, applicant had no ownership in real estate. In 1946, as de-

visee under the will of her late sister, this applicant became the owner of property on which she has resided continuously since first applying for Old Age Assistance. The property was bequeathed to this recipient free of encumbrances and is now assessed, and has been assessed for more than five years prior to the date of acquisition by this recipient, in the amount of $4200."

Upon these facts you have asked my opinion:

"as to whether or not the Board of Public Welfare in Fall River may require a bond and mortgage, as provided in section 4 of chapter 118A, as a condition of continuing assistance under this law."

As the person to whom you refer is, from the facts which you have stated, the owner in fee of a parcel of real estate, the provisions of G. L. (Ter. Ed.) c. 118A, § 4, have no relation to her. The provisions of said section 4 relate only to the ownership of "*an equity* in vacant land or in real estate upon which an applicant lives."

"Ownership of an equity in land" describes the rights in land of a mortgagor whose title may be termed an equitable one. It has no application to ownership in fee without encumbrance.

2. As to those persons who seek old age assistance and have come into ownership of an equitable title to land through the death of a joint tenant therein or the conclusion of a tenancy by the entirety, a grant of assistance to them comes within the provisions of said G. L. (Ter. Ed.) c. 118A, § 4, and a bond and mortgage may be required under the terms of said section as a condition of receiving old age assistance.

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

Schools — Superintendency Union — "Valuation" of a Town as Used in G. L. (Ter. Ed.) c. 71, § 61.

JUNE 26, 1947.

Hon. JOHN J. DESMOND, Jr., *Commissioner of Education.*

DEAR SIR: — In connection with your duties relative to the union of towns for employment of a superintendent, you have asked my opinion as follows:

"Does the word 'valuation' used in G. L., c. 71, § 61, refer to 'local valuation' or the so-called 'apportioned valuation'?"

G. L. (Ter. Ed.) c. 71, § 61, reads:

"The school committees of two or more towns, each having a valuation less than two million five hundred thousand dollars, and having an aggregate maximum of seventy-five, and an aggregate minimum of twenty-five, schools and committees of four or more such towns, having said maximum but irrespective of said minimum, shall form a union for employing a superintendent of schools. A town whose valuation exceeds said amount, may participate in such a union but otherwise subject to this section. Such a union shall not be dissolved except by vote of the school committees representing a majority of the participating towns with the

consent of the department, nor by reason of any change in valuation or the number of schools."

The word "valuation" is defined in G. L. (Ter. Ed.) c. 4, § 7 (35), as follows:

"In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears.

. . . . . .

" '*Valuation.*' 'Valuation,' as applied to a town, shall mean the valuation of such town as determined by the last preceding apportionment made for the purposes of the state tax."

Provisions for *valuation* of towns by a State officer in connection with the apportionment of the State tax were enacted in 1881 by chapter 163 of that year. Said chapter 71, section 61, in which the word "valuation" is used, stems from St. 1888, c. 432; it is to be assumed that the Legislature acted with full knowledge of the mode of establishing valuations of towns by the State under earlier acts. St. 1888, c. 432, contains no specific reference to a valuation made by local assessors, nor do any of the amendments subsequently passed.

Said chapter 71, section 61, has been amended since the definition of "valuation" in said chapter 4, section 7, was enacted (see St. 1926, c. 313) and no language was employed by the Legislature in the amendments indicating an intent that the word "valuation" should have a meaning contrary to that set forth in said chapter 4, section 7 (35).

There is nothing in the specific phraseology or in the content of said chapter 71, section 61, which indicates a legislative intent that local valuation instead of the valuation described in the definition should be indicated by the word "valuation" therein. Indeed, it would seem that the use of the word "valuation" with the statutory definition creates an unvarying and uniform standard for determining the valuation of towns for school union purposes and reflects the worth of all the town's property, not merely the property subject to local assessment and taxation, as to which methods of assessment often vary as between local boards of assessors.

It is apparent from the foregoing considerations that an intention to give to the word "valuation" in said chapter 71, section 61, a meaning contrary to that set forth in the statutory definition cannot be said to have been in the mind of the Legislature.

Accordingly, I answer your question to the effect that the word "valuation" in G. L. (Ter. Ed.) c. 71, § 61, refers to the so-called "apportioned valuation."

Very truly yours,
CLARENCE A. BARNES, *Attorney General.*

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